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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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JESSICA RAMSAY, Plaintiff, v. NATIONAL BOARD OF MEDICAL EXAMINERS, Defendant.	: CIVIL ACTION NO. : 2:19-cv-02002 : : : : PRELIMINARY : INJUNCTION HEARING : DAY 2	FILED FEB 05 2020 KATE BARKMAN, Clerk By VA Dep. Clerk

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601 Market Street
Philadelphia, PA 19106
December 4, 2019
Commencing at 9:29 a.m.

BEFORE THE HONORABLE J. CURTIS JOYNER

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(Court called to order at 9:29 a.m.)

THE COURT: Good morning.

Are we ready to proceed?

MS. VARGAS: Yes, Your Honor.

THE COURT: Very well. You may resume the stand, Ms. Ramsay.

Oh, you're calling somebody out of order?

MR. BURGOYNE: Your Honor, he was going to defend a thesis today and his student notified him last night that she is not coming, so we don't have to go out of order.

THE COURT: I'm sorry to hear that from the student.

MR. BURGOYNE: Yeah, it was a little -- not a good way to start on your getting your thesis reviewed.

THE COURT: No. All right, Ms. Ramsay, then we can proceed with the continuation of your testimony.

MS. VARGAS: Your Honor, if I could just ask briefly about scheduling.

There was some discussion at the end of the day yesterday that we might not finish today and what that --

THE COURT: If you don't finish today, then we'll finish tomorrow.

MS. VARGAS: Okay. Thank you, Your Honor.

THE COURT: I hope.

And, Ms. Ramsay, I'll remind you you're still under oath from previously being sworn in yesterday.

Do you understand that, ma'am?

THE WITNESS: Yes, Your Honor.

THE COURT: Very well. We have the same situation with the mics today. I'm working without my clerk. She has a family matter this week, so I'm lonely.

MR. BURGOYNE: Jessica, I'm going to start with Exhibit 73, if you want to turn to that.

THE WITNESS: Thank you. I think it's on.

THE COURT: Great. There it is. All right. Let's proceed.

CROSS-EXAMINATION

BY MR. BURGOYNE:

Q. All right. Good morning, Jessica. I just mentioned, let's start with Exhibit 73, please.

A. Okay.

Q. And as you can see, this is an email from you to Dr. Ruekberg, who we were -- an individual we were discussing yesterday. And he is your psychologist?

A. Psychiatrist.

Q. Treating psychiatrist?

A. Yes.

Q. Okay. And he provided a letter in support of your second request for accommodations on Step 1. Correct?

A. Yes.

Q. Okay. In this letter dated January 26, 2018, you tell

him: Sorry for not getting this to you sooner, I was trying to get at least a little bit in each section and get rid of a lot of extra details to make the information clearer.

And then you attach a table --

A. Yes.

Q. -- to this document. And we're going to look at several exhibits today in which you have such tables. And I'll note to you these weren't produced to us by you in discovery, these were produced to us by Dr. Ruekberg.

A. Okay.

Q. Okay?

What is the table that you were preparing and working on in these various communications to Dr. Ruekberg, starting on the second page?

A. This table was something I used to help me write my personal statement. And he asked to see it, because I had a hard time communicating everything he was asking about or everything that the guidelines asked about. And so he asked me to put it -- or to send him the table that I had used. But I wasn't quite done with it, so it took me longer than expected to get it to him.

Q. Okay. And this is seven or eight pages, but there's sort of pictures included in the table?

A. Yeah.

Q. Where did you get this document that you were working

from? I assume you didn't go in and paste these pictures of clocks and things like that in here.

A. Yeah, I did.

Q. Okay. So this is a document you created entirely?

A. Yes.

Q. And on the last page -- I'm sorry, these pages aren't numbered, but it's the next to the last page in this document.

A. Okay.

Q. And you see on the first column, it just has, how will each accommodation alleviate functional limitations. And then on the right, you've provided a statement regarding how much extra time you thought you needed.

And what amount of extra time did you include in the chart at that time?

A. 50 percent.

MR. BURGOYNE: And the Bates number, Your Honor, for that page is 2248.

BY MR. BURGOYNE:

Q. And if you turn, Jessica, if you would, please, to Exhibit 74, is this an email message that you sent Dr. Ruekberg in February of 2018?

A. Yes.

Q. And you're forwarding another copy of the table that you had prepared?

A. It appears so.

Q. And then in addition to the table, it looks like you've gone in and now prepared comments in the right-hand margins for him to review?
A. Yes.
Q. And then on the page that's the second page of this document, I'm sorry, it's the page that says 231 at the bottom.
A. Okay.
Q. Your first comment, the last comment in that block, you state: To help with Step 2 CS requests later, it may also be beneficial to mention at least how -- and I can't read it because it's blue -- is even more of a struggle because I not only have to translate my thoughts into words but I have to read and reread what I've written using the process I've described.
A. Okay.
Q. And that's -- were you attempting at this point to have him include language that might help you get accommodations on Step 2 CS?
A. I don't think language was the issue, it was whether or not to include the writing as part of the explanation with -- for what I struggle with, because I didn't know if reapplying for Step 2 CS, if I would have the opportunity to include that then, because I haven't been through this process that far before.
Q. And then if you look at the page that says 239 at the

bottom, Bates number.

A. Okay.

Q. All right. And the last sentence in this page states: I think a separate testing room, 50 percent additional testing time with additional break time over two days would best equalize my access to the exam.

A. Okay.

Q. All right. And those were words you wrote?

A. At the time, yes.

Q. And those were words you wrote in, what, 2018, February 2018?

A. Yes.

Q. And that was after you'd taken Step 1 the first time?

A. Yes.

Q. And out of those, at this point, you have a separate testing room?

A. Yes.

Q. You have additional break time?

A. Yes.

Q. And you have testing over two days?

A. Yes.

Q. So the one thing you don't have is any additional time, 50 percent?

A. Correct.

Q. Look at the next page. It's Exhibit 75, rather.

A. Okay.
Q. And do you recall that in connection with working with Dr. Ruekberg in his preparation of a supporting letter, you and your mother and your fiancé completed ADHD symptom checklists?
A. Yes.
Q. And would you confirm for me that Exhibit 75 contains the symptom checklist that you provided and your mother provided and your fiancé provided to Dr. Ruekberg?
A. Yes.
Q. And the first one, page -- Bates page 223, it says at the top, Jerri mom.

Is that your handwriting?
A. I can't really tell, but I think so.
Q. Okay. And it reappears on the next page. I don't know if that makes it easier to confirm that's your handwriting?
A. I believe so.
Q. Okay. And so the first two pages reflect what your mom was reporting regarding your ADHD symptoms?
A. Yes. I had to do this over the phone with her, so I had to ask her -- I sent her the list.
Q. Okay. And it looks like there's a total of 18 symptoms described in this chart?
A. Yes.
Q. And it looks like she indicated on here that you had all 18 symptoms and that the degree of severity for all of them was

severe; is that correct?
A. It appears so, yes.
Q. And then you also filled out a prompt or a symptom report for Dr. Ruekberg. Is that on the third page at 225?
A. Yes.
Q. And it looks like you likewise indicated that you have all 18 symptoms, and again indicated that they were -- assigned to each of them the most severe rating possible?
A. In the major categories, yes, but I also ranked each individual prompt separately.
Q. But relative to the 18 categories, you assigned maximum severity to each one?
A. Yes.
Q. The last two pages starting on 227, are these the ratings provided by your fiancé?
A. Yes.
Q. And his name is Neil?
A. Correct.
Q. And it looks like he's assigned sort of varying degrees of symptoms. Some he indicates, for example, can't organize, he indicates you have no symptoms in that regard. Others he indicates you have moderate symptoms. And then some he indicates you have severe symptoms; is that correct?
A. Yes.
Q. Look at Exhibit 76 for me.

A. Okay.
Q. And would you just confirm this is another chart that you prepared, an updated chart that you sent Dr. Ruekberg in March 2018?
A. It appears so.
Q. And it looks like on the page 219, as of March 2018, you're still indicating that you need 50 percent additional time?
A. Where is that?
Q. Requested accommodations on page 219.
A. Can you point or tell me where again, please?
Q. Sure.
A. On the table that you're referring to?
Q. Do you see on the left-hand side, the first column, it says requested accommodations, middle of the page?
A. Okay. Yeah. It says 50 percent.
Q. Okay. So at that time, as of March, you still thought 50 percent --
A. I don't know if I thought that. I think I was asking for advice on whether -- if I decreased the amount of time I was requesting, if it would be more likely to be approved. And so I had been talking to people to see if they had any experience with that. So at that time, I was considering it.
Q. The last page of this document, you say the same thing: I think the separate testing room, 50 percent additional testing

time, additional break time over two days would equalize my access to the exam.

A. It appears unchanged from the one in February, so yes.

Q. Exhibit 77. Is this an email from you to Dr. Ruekberg in March of 2018?

A. Yes.

Q. In the second line you say: To make it easier for you and the school to support my request for accommodations, I worked really hard to condense my reasoning down to the bare minimum. I've attached the document to this email and also sent one to the school so they would be working from the same information.

And then is the document that follows that, you've now got a two-page document. Is that a document you prepared and sent to Dr. Ruekberg?

A. I believe so.

Q. And again, you've indicated 50 percent additional testing time over two days. Page 207.

A. Where in the...

Q. The paragraph begins, "Simplified versions of the main things I want to say to support each accommodation I am requesting."

A. Oh, okay. Yes.

Q. And the working diagnoses you identified to him at this time in support of the accommodations you wanted were ADHD, combined presentation, and then learning disability nonverbal

with impairment in reading with impairment in written expression. And you say over on the right: I'm still not sure which to use for now. I've included the one Dr. Lewandowski gave as well as the ones we've talked about.

A. Where was that?

Q. Your comment on the right.

A. On the same page?

Q. Same page. You didn't mention migraines at this time?

A. Not apparently in this document, but I haven't read the whole thing.

What was your first question about that, about the comment?

Q. Yeah. That's a comment you wrote in there saying you were still not sure which learning disability to identify in support of your accommodation?

A. Yes. I wasn't sure if the learning disability that Dr. Lewandowski had diagnosed was encompassed by the one that -- or the couple that Dr. Ruekberg had diagnosed clinically.

Q. And again, we established yesterday, Dr. Ruekberg didn't perform any diagnostic evaluation of you, he didn't administer the type of assessments Dr. Smith did?

A. No. But I didn't know that that made a difference at that point.

Q. The next exhibit is Exhibit 78. We're now into April 2018.

Is this another email from you to Dr. Ruekberg?
A. Yes.
Q. All right. And you say in this email: Sending the document to you so you have it to make changes if needed during the appointment. Sorry I'm not completely done with it. I tried.
A. Okay.
Q. All right. And then the document that follows goes from page 194 to 202 -- or 1, basically.
And is this your revised version of Dr. Ruekberg's initial letter?
A. I don't know if it's technically my revised version. I think I had help with that from other people.
Q. Which other people did you have help with on that?
MS. VARGAS: Objection, attorney-client privilege and work product.
BY MR. BURGOYNE:
Q. Putting aside your lawyers, who else helped you?
THE COURT: He's withdrawn the question.
BY MR. BURGOYNE:
Q. Putting aside your lawyers --
THE COURT: He's rephrased question. All right?
MS. VARGAS: Thank you.
THE COURT: All right.
THE WITNESS: Maybe my mom helped me with editing and

stuff.

BY MR. BURGOYNE:

Q. And then the document that follows, there's comments over in the right and highlighting.

Are those comments and highlighting that you provided?

A. I don't know if all of them are all from me.

Q. Well, they said Comment JR.

A. I may have been communicating some.

Q. You typed them in, in all events; is that correct? Is this a document you prepared and then sent to Dr. Ruekberg, since it has your initials in the comments?

A. He wrote the letter. I had typed the comments.

Q. Okay. And the comments go -- like you have 38 comment boxes that you provided to him. I take it, in order to provide those comments, you were closely reading this letter?

A. I had the Kurzweil to help with that.

Q. And it looks like some of your comments on page 198?

A. Okay.

Q. You'll recall at the top there was a paragraph I asked you about yesterday that was in his initial draft, stating: Even if the board does not find Jessica meets criteria for accommodations for ADHD, in my professional opinion, the board should approve Jessica for accommodations for reading and writing learning disabilities.

A. Okay.

Q. Do you remember our discussion in that paragraph yesterday?
A. Yes.
Q. And then I asked whether you had suggested that that be deleted or changed.
A. Okay.
Q. Okay. And you see on one of your comments here you tell him that you would rephrase that paragraph; is that correct?
A. Yes.
Q. And then your next comment is: May be smart to say something along the lines of, quote, In all future exams of a similar nature to help the process moving forward.
A. Yes.
Q. And then there's -- a sentence has been inserted addressing informal accommodations, stating: She has received -- she received informal accommodations starting in the second grade, including a secluded testing area and extra time to work on assignments. Throughout elementary, middle and high school, there were multiple instances where working with her teachers and sometimes needing to involve her mother, Jessica received informal accommodations.

And do you see over on the right you say: I added this sentence, but you can change it?
A. Which comment?
Q. 21.

A. Okay.
Q. And do you recall making that suggestion to Dr. Ruekberg for an addition?
A. I don't recall doing it specifically, but it says here.
Q. Then on page 2200 at the top, it looks like you were correcting spelling and grammar errors, one of your comments?
A. Again, my mom helped me with editing.
Q. Exhibit 79.
A. Okay.
Q. And you said, this is April 20: Dear Dr. Ruekberg, Here is the final draft of the letter. Sorry it is so long. I had to add a lot to support each of the points in the NBME guidelines.

And then what follows is a nine-page, small-font document.

Is that the document you sent him in April 2018?
A. I'm sorry, because it's not dated, but I would assume so if it was attached.
Q. And if we go to Exhibit 64, page 42 -- I'm sorry, page 27, Jessica.

THE COURT: Three strikes, you're out, Counsel.

MR. BURGOYNE: Pardon me?

THE COURT: Is that your phone ringing?

MR. BURGOYNE: Well, I actually was wondering that, Your Honor.

I apologize, Your Honor.

BY MR. BURGOYNE:

Q. Page 27.

A. Okay.

Q. Okay. And I think we established yesterday, this was an early draft from Dr. Ruekberg of his letter; is that correct?

A. Yes. I believe this is the one that I said was his early thoughts in the draft, yeah.

Q. And now if we go to 79, that two-and-a-half page letter has become the nine-page letter that was eventually sent to NBME?

A. I'm sorry, Exhibit 79?

Q. Yes.

A. Okay.

Q. Is that correct?

A. Your question was, the attachment is nine pages?

Q. Yeah. That's what, at least at that time, was the final version of the letter?

A. At that time, yes.

Q. Okay. Then if you go to Exhibit 80, we're now into May 2018. And you're forwarding suggestions for Dr. Ruekberg's letter?

MS. VARGAS: Your Honor, this exhibit includes attorney-client privilege and attorney work product. It's actually documented that way on the exhibit and was disclosed inappropriately. And so to the extent you would be seeking to

put before the Court privileged material, we would object.

MR. BURGOYNE: Your Honor, this is the letter that was produced to us in discovery by Dr. Ruekberg. They were aware of it. It's been in our exhibit book.

THE COURT: Your objection at this time is overruled.

I'm going to allow questions on it. This is not a proceeding where a jury is sitting. I can remove the considerations that are attorney-client from any considerations that I may have in reference to the preliminary injunction or the permanent injunction.

MS. VARGAS: Thank you, Your Honor.

THE COURT: So it's overruled at this time. All right?

MR. BURGOYNE: Thank you.

THE WITNESS: What was your question again?

BY MR. BURGOYNE:

Q. The question was, at this point in this email from May 2018, are you forwarding suggested changes to Dr. Ruekberg's letter from your attorney?

A. I think so.

Q. It looks like at the bottom there were also comments provided on your draft letter from a Dr. Sorrentino.

Who is Dr. Sorrentino?

MS. VARGAS: Your Honor, he's asking work product and attorney-client privilege. I recognize what you've said, but

he's now asking directly about communication from the attorney in the court record.

THE COURT: I'm going to sustain the objection to this question.

MR. BURGOYNE: And I'll just note, Your Honor, this isn't -- presumably it's not attorney-client privilege because it was sent to Dr. Ruekberg and any privilege would have been waived. It might be work product, but it was prepared in connection with a request for reconsideration, not in connection with this lawsuit, so I'm not sure there's a valid work product. Notwithstanding that, I'll accept your ruling and move on.

THE COURT: I find it to be a work product. And I sustain the objection, so move on.

BY MR. BURGOYNE:

Q. Exhibit 81. Actually, you don't even have to worry about Exhibit 81.

MR. BURGOYNE: I apologize, Judge.

THE WITNESS: Okay.

BY MR. BURGOYNE:

Q. We're now up to Exhibit 82. And this looks like what is in fact the final draft of the letter.

THE COURT: And again, this is work product?

MS. VARGAS: Yes, it is, Your Honor. It's directly discussing communication with the attorney.

THE COURT: Very well. It's sustained.

Next.

BY MR. BURGOYNE:

Q. Exhibit 85. We've now gotten to the point, it's September 22, 2018. You submitted your second request for accommodations in June, and that request was denied. And you're now working with your attorney on a request for reconsideration at this time. Is that accurate?

A. Okay.

Q. Is that timing accurate?

A. In June we're working on it, is that what you said?

Q. No. In June you had submitted your second request.

A. Yes.

Q. It was subsequently granted in part and denied in part.

And at this point, September, you're working with your attorney on a request for reconsideration; is that correct?

A. Yes.

Q. Okay. And is this a letter -- an email from you to Dr. Ruekberg?

A. Yes.

Q. And it looks like in the third bullet point you're reporting that you had had a preliminary telephone conversation with Dr. Smith and that he is someone you identified --

A. For the third -- like left side bullet?

Q. They're dark bullet points, yes.

A. Sorry, what was your question again?
Q. First of all, did you identify Dr. Smith by doing an internet search?
A. I did originally, yes.
Q. Okay. And then the bottom of this, you say: Separately, my lawyer also received a recommendation for Dr. Smith for a colleague who has worked with medical students applying for accommodations from the NBME.
MS. VARGAS: Your Honor, work product.
THE COURT: Overruled.
BY MR. BURGOYNE:
Q. And then first indented bullet point, it looks like you're saying: Here are some highlights from our conversation that might interest you.
And that's referring to your telephone -- was that a telephone conversation you had with Dr. Smith initially?
A. I believe it was.
Q. And then that first bullet point, you say: He stated that the testing Dr. Lewandowski performed is used to show deficits incurred from trauma, CVA or brain tumors and is generally not helpful in showing ADHD and not at all appropriate for evaluating possible learning disorders and that he should have done appropriate testing.
Is that information that you received from Dr. Smith?
A. It may not be a direct quote, but it's the impression that

I received.
Q. And you met in person with Dr. Lewandowski on two occasions?
A. I believe so, yes.
Q. All right. And the first time was I think maybe a one- to two-hour evaluation, just discussion and interview?
A. I don't know if it was two hours, but I know that it was longer than like -- I know it was longer than half an hour. I don't know exactly how long it was.
Q. Longer than you spent with Dr. Smiy?
A. Yes.
Q. And then you came back a second time to see him, and he performed a series of assessments?
A. His technician did.
Q. Okay. And he's a licensed neuropsychologist?
A. I believe so.
Q. And at this point you had already sent -- Dr. Ruekberg's letter had already been sent to the NBME. For the record, the final version of that letter was included in PX-2 at page 37. But you attached to this document another edited document with redlines and comments.

What were you contemplating that Dr. Ruekberg was going to do in September 2018? Why did you send him this information?
A. To the best of my recollection, I think this was when we were considering having him write a follow-up letter to address

the points that the denial letter had said -- had said, but since they didn't really acknowledge anything from Dr. Ruekberg, we decided against it.

Q. On page 152, comment 9, looks like you're discussing the severity of certain symptoms you experienced there on the bottom where the draft letter was?

A. Okay.

Q. And you state: We can support moderate with the fact that I have to have Neil, other people, read for me at home, outside of school, and I require accommodations for reading and writing at school. We could even support severe because I can neither read nor write efficiently at home, school or work.

A. Okay.

Q. What were you communicating -- why were you making those comments to Dr. Ruekberg at that time?

A. I don't remember at this time. I'm assuming it had to do with whatever conversations we were having at the time.

Q. You also submitted a letter from a Dr. Houtman?

A. Yes.

Q. And that letter is included in the record at PX-2, page 45.

Did you and your lawyer also work with Dr. Houtman in crafting her letter?

A. Not crafting it, no.

Q. Preparing it, drafting it?

A. She sent us the letter almost written, and we asked her to -- or, well, actually, she had forgotten a section, and we asked her to put that back in. And she had already, like, said she had forgotten, so she added that section too. And then I think we may have helped with editing at the end.

Q. Okay. Look at Exhibit 65, please. And confirm for me, if you will, that these are a series of emails and attachments that were on your computer and you forwarded to or you provided to us in discovery?

A. You said 65?

Q. 65, yeah. Starting with Ramsay 0003.

A. Okay.

Okay.

Q. And is this a document you sent to Dr. Houtman in May 2018 with a description of the symptoms that you -- and impairments that you thought supported accommodation?

A. I believe it was the same list we looked at earlier.

Q. Reminds me, you said a moment -- in one of your emails, you said, I have simplified everything that I've put together, Dr. Ruekberg, and I'm getting this to you and to the school so that everybody has the same information, words to that effect.

Who was it you were sending that simplified version of your background to when you referred to the school?

A. My best guess would have been that it was to Erin Dafoe.

Q. Erin Dafoe is the individual who drafted the letter that

eventually went out over Mr. Overton's or Dean Overton's signature?

A. I believe so.

Q. Look at page -- the page that says 8 at the bottom.

A. Okay.

Q. All right. And I'll explain to you that, as I understand the manner in which these documents were produced to us, the attachments came first and then the email that was forwarding the attachments.

So if you look at page 8, this is an email from Dr. Houtman to you saying: Here is my first attempt. Let me know what needs changing and I'll get it on letterhead.

Is that an email you received from Dr. Houtman?

A. It appears so.

Q. And then if you go back to pages 6 and 7, is this her initial draft that you referenced a minute ago?

A. If that was the one attached to the email, then yes.

Q. It looks like she sent this to you on June 3, 2018 at almost 6:00; is that right?

A. It looks like it.

Q. If you then go to page 17, which is the same date, her letter came to you about 6:00, and it looks at 9:17 p.m. you've sent back the redlined document that is found at pages 14 through 16.

A. I'm sorry, can you say that again?

Q. Sure. On page 17, is this an email, in the middle of the page, that you sent to Dr. Houtman?
A. Yes.
Q. All right. It's dated June 3rd, 9:17 p.m.?
A. Okay.
Q. And it's got a paragraph here where you say: Thanks so much for writing the letter! There's then a redacted sentence, presumably on work product grounds. And then you explain to her the changes you've made to the letter.

And then if you look at the three pages preceding that email, are those changes that you forwarded to her on that date?
A. I don't know if they're all changes or just areas that I highlighted with changes, but...
Q. In all events, they're comments you made after reviewing her letter and reading that letter?
A. I don't know if they were my comments. I typed them, like you stated before.
Q. Okay. And if they weren't your comments, whose comments would they be?
A. My lawyer's.
Q. And the final letter we mentioned was the letter from Dean Overton.

MR. BURGOYNE: Which is PX-2, Your Honor, at page 50.

BY MR. BURGOYNE:

Q. And if you look at Exhibit 63.
A. Okay.
Q. And at the bottom of the page, is this an email from you to Erin Dafoe on April 11, 2018?
A. Yes.
Q. And you say: I lied. I read it and I am so impressed you were able to organize the mess of thoughts and words I gave you into something so well put together. I only have a few corrections/editing requests.
A. Okay.
Q. So did you prepare the initial draft of the letter for Ms. Dafoe, or did she prepare an initial draft using information you gave her?
A. She prepared the letter, the initial draft.
Q. When that request was denied in June, as you said, you went to see Dr. Smith. Correct?
A. Denied in June?
Q. You submitted it in June, and it was subsequently denied.
A. In September, I think, yes.
Q. To make sure we have that in the record, would you look at DX-4, Tab M, and just confirm that this is the letter you received from NBME granting certain accommodations but denying extended time. And specifically the accommodations you were approved for are on page 3 of the letter.
A. This is the letter, yeah.

Q. So just in terms of time, it's September 11, 2018 was when you learned the decision from NBME?
A. That one, yes.
Q. And then very soon thereafter, you went to see Dr. Smith. Correct? I believe you saw him on September 25th for an evaluation?
A. That sounds right.
Q. And you went to see him specifically to get an evaluation report that would support your request for extended testing time?
A. No. I went there specifically for testing that measured reading speed, because the letter had said something about not having objective measurements of my reading speed. And since I went to Lewandowski for the same thing but he didn't do those tests, I looked for someone who could do those tests.
Q. Okay. But you wanted that testing in order to support your request for extended testing time on Step 1?
A. Since I hadn't -- since I was told basically I didn't have enough documentation to support it, yes.
Q. And then you and your attorney worked with Dr. Smith on his letter; is that correct?
A. I don't know necessarily if I did, but I know that we communicated about making sure all the facts were correct.
Q. And Dr. Smith in fact sent drafts of his report to both you and your counsel for review?

MS. VARGAS: Objection, Your Honor, work product.

THE COURT: Yes.

MS. VARGAS: Dr. Smith is an expert witness we'll be calling to the stand next.

THE COURT: And you'll be able to cross-examine. Very well.

BY MR. BURGOYNE:

Q. Exhibit 48, 49 and 50, would you just confirm for us that these are all emails either to or from you and Dr. Smith?

A. I'm sorry, was that -- what numbers?

Q. I'm sorry, Jessica. 48, 49 and 50.

A. Thank you.

Q. So we can start with 48.

And then pages 40 -- the first two pages, it says 45 and 46 in the Bates numbers.

A. Okay.

Q. Is that information you sent to Dr. Smith for his consideration to be included in his report?

A. I believe so.

Q. And then 49, Exhibit 49, is this an email from Dr. Smith to you and Lawrence Berger forwarding a draft of the report?

A. Yes.

MS. VARGAS: Objection, work product.

THE COURT: Again, it's work product, Counsel.

BY MR. BURGOYNE:

Q. Exhibit 50. Can you just confirm these are email exchanges between you and Dr. Smith?
A. Yes.
Q. Turn to Exhibit 57, if you would.
Would you confirm that this is a secondary application that you prepared for the University of Wisconsin's medical school?
A. I don't know if it was the final one, but possibly. But it was for the University of Wisconsin.
Q. And did you end up applying to medical school in Wisconsin?
A. Which year?
Q. Any year.
A. I think so.
Q. And then if you look at page -- the page it says at the bottom, Ramsay 47.
And is this a discussion of your employers and activities?
A. That's the title of the table, yes.
Q. It looks like you have a description of your lifeguarding job. As a guard, I have to react quickly and intelligently in emergency situations, provide necessary care. And you were also providing swim instructions over a four-year period, it looks like.
And this is after high school, 2008 to 2012?
A. Yes, yes.

Q. And then it looks -- if you turn the page, it looks like when you were at Ohio State, for the first description here, you were teaching a chemistry lab at school?
A. Yes.
Q. And you were tutoring students in both general and organic chemistry?
A. Yes.
Q. And you were guiding students in proper lab procedures?
A. Yes.
Q. And grading lab reports, assignments and quizzes and exams?
A. Yes.
Q. And the next one, it looks like you have a different title, you're now an instructor's assistant and head teaching assistant?
A. It was the same job, it just had different names.
Q. Okay. And this is post-graduation, it looks like?
A. Yes.
Q. And you were working full time in this position?
A. They included the grading hours I believe in that, so yes.
Q. On the left side you indicate 40 hours per week?
A. Yeah. That was within the job description.
Q. Okay. And it looks like you had this job not quite a year?
A. Yeah, yes.

Q. And you were, in this position, it says you were teaching three lab sections.

How many students were in each lab section?

A. No more than 20.

Q. So you were teaching three sections. You were also head TA for one section each week and that you managed six sections.

Did that mean you supervised sections that were under the responsibility of other teaching assistants?

A. Yes. But mostly I was supposed to be in the chemistry supply window so that if anything went wrong for those labs, then I could be there to help out or answer questions for students who came by.

Q. Look at DX-4, Tab L. We discussed a little bit your time with Dr. Lewandowski.

A. Okay.

Q. And in this document, it's probably easiest to look at -- there's no page in numbers or Bates numbers. So look at the top of the page and go to the page that says page 79 of 106.

A. Okay.

Q. And this is page 5 of the document.

And this is a letter from Dr. Lewandowski on a consultation dated October 25, 2017.

A. Okay.

Q. And you see in the last paragraph there, he says: I spent approximately 120 minutes with a patient today in individual

examination consulting with her mother, providing a detailed neurobehavioral cognitive status examination and preparing this consultation.

A. Okay.

Q. Does that refresh your recollection regarding the amount of time you spent with him? Easier way to say it, you don't have any reason to disagree with his summary of how long he spent with you?

A. I don't know if that's the time he spent with me, but it could have been between me and his note.

Q. Okay. On page 2 of this document, there is a discussion of some of the background information he obtained from you at the time.

A. Okay.

Q. Do you see that, social history?

A. Sorry.

Q. And in your social history, there's a section called avocational. And this is on page 76 of 106.

Do you see that?

A. Can you say where on the page?

Q. It's right above medical.

A. Okay.

Q. All right. And do you recall discussing with Dr. Lewandowski your interests?

A. Somewhat. He kind of didn't really let me talk a lot, but

he would say, do you like this, do you like this. And then if he hit something that I said yes to, then he would ask more details about that, but quickly. So I do remember somewhat those things.

Q. And he lists -- you reported to him that your interests include sports, art, painting acrylics, drawing, ceramics, camping, reading, paper making.

Are those all interests that you communicated to him during your evaluation?

A. No. I would have never said reading. I think in fact I said that I hated reading. But I like being read to is probably something I would have said.

Q. Let me ask you to flip to your deposition.

THE COURT: Page and line?

MR. BURGOYNE: Page 232.

MR. BERGER: Give us a moment, please.

THE COURT: One moment. Let him get to that before you ask your question. That's the proper procedure before you ask the question, Counsel.

MR. BURGOYNE: Okay. And, Larry, it's line 2, page 232.

THE WITNESS: Okay.

BY MR. BURGOYNE:

Q. In looking at line 2 from your deposition, my question was: On page 2, there's a list of your avocational interests.

You said: Where you highlighted. Okay.

And I go on and say: And then avocational. Sports, art, painting, acrylics, drawing, ceramics, camping, reading, paper making.

And I then asked you: Is that all information you provided to him?

And what was your answer at that point?

A. Can you tell me what line the --

Q. Line 12. It's the answer immediately after the question I put to you.

A. Okay. It says: He asked me what my interests were, so I would assume so because that's all stuff I like to do.

Q. I'll take that back from you.

Exhibit 52. This is a copy of your CV; is that correct?

A. It's a working copy.

Q. And then on page 2, there's a list of publications and presentations. Correct?

A. Okay. Yes.

Q. And it looks like you've been a co-author on four publications?

A. That's correct.

Q. And are those all peer-reviewed, do you know?

A. I'm not sure.

Q. And then let's just look at a couple of them.

Exhibit 53.

A. Okay.
Q. And it's a research article from 2015 entitled "Genetic Influences on Nicotinic A5 Receptor," and the title continues on.
And on this particular article, you are the lead author in terms of which author is listed first.
What is the significance of being the lead author on a publication?
A. Generally -- it can vary, but generally it's the person who put in the most work or had the idea for the research, whether the most work was the paper itself or the research, like the experiments that went into it.
Q. And then Exhibit 54, is this a second article that you were the lead author on, it's titled "Organic Acid Disorders"?
A. Yes.
Q. And it looks like this was from 2018?
A. Yes.
Q. You scored on the Step 1 exam a 191. Correct?
A. Yes.
Q. And then your attorney asked you, if you had gotten a passing score of 192, would that have been representative of your knowledge and abilities. And I believe you answered no?
A. When was this?
Q. Yesterday.
A. I believe that's correct.

Q. Okay. Would a 195 have been representative of your knowledge and abilities?
A. It's impossible to tell, because I wasn't able to read all of the -- each question.
Q. Well, if you received a 195, would you think that was a reasonable representation of your abilities?
A. It's impossible to know. I would have to read all of the questions and answer them to know what my score would be. That would be representative.
Q. Okay. Because you were able to answer at 192, because you can't answer at 195?
A. The score isn't -- my ability to read isn't based on the score. The score is based on my ability to read.
Q. Look at Exhibit 66 for me.

Yesterday you testified a few times during your direct about exams that you took in medical school and you referred to them as NBME exams.

A. Okay.
Q. Those are subject matter exams or shelf exams that NBME prepares but that schools can use; is that correct?
A. Some of them are.
Q. And any decision regarding accommodations on those exams, those are made by your school, not NBME. Correct?
A. I'm not sure about that.
Q. Do you have any reason to think that NBME was involved in

deciding whether you got accommodations on your subject matter exams?

A. Yes.

Q. What's your basis for that?

A. Because my school told me that when they contacted NBME to like request and provide the accommodations, that when I initially requested that they be on paper, the test be provided on paper like I was receiving at school, the NBME had told my school that they can't do that and -- because they only provide the test on the computer. And so that is what happened. I still had to take the test on a computer.

Q. Okay. So other than whether or not there was a paper version of these tests, was NBME involved at all in deciding whether or not you could get accommodations when you took those exams at your medical school?

A. I don't know. That's just what my school told me. So as far as I knew, they had been asking NBME.

Q. Okay. And you weren't involved in any of those discussions? Those were discussions that your school said they had with NBME?

A. I believe so, yes.

Q. Okay. Let's look at Exhibit 66.

A. Okay.

Q. And this is a document captioned Customized Examination Performance Profile. Examination name: NBME CAS 1.

A. Okay.
Q. What is this document? What subjects were you being evaluated for under this exam, do you recall?
A. I know this was one of the first exams that we had in -- I believe it was after our first term in our first year. And we would have only had our first few classes, so I believe that the topics selected were to be representative -- or not representative, to be only from those subjects that we had -- courses we had taken.
Q. Okay. Let's look at the next page then, which is 27, Ramsay 27.
A. Okay.
Q. And this is a customized examination performance profile for an exam that you took, it looks like it says organic, maybe, I'm not sure, but you took this exam in 2015, June. That was your second year of medical school?
A. Nope.
Q. When was that?
A. That would have been the end of my first year.
Q. End of your first year. And did you take this examination with accommodations?
A. I believe so.
Q. And that would have included double testing time?
A. I believe so, yeah.
Q. The second page, does this reflect your performance on the

exam?
A. At that time, I believe it would.
Q. Okay. And so with accommodations, you got 66 percent of the questions correct it looks like.
And does this indicate that you were below average performance in several areas, for example, cardiovascular?
A. In a couple of them, yes.
Q. Physiology, yes, it looks like you didn't do as well?
A. Yes.
Q. Look, please, at NBME -- or Defendant's Exhibit 67, which is a document captioned NBME Comprehensive Basic Science Self-Assessment.
A. Okay.
Q. And it looks like this was a test you took in 2016.
This was also your first year?
A. 2016 would have been my second year.
Q. Your second year. Okay.
All right. And is this an assessment you took with extended testing time?
A. I believe so.
Q. Okay. And likewise, with whatever other accommodations your school provided, including a private testing room?
A. Yes.
Q. And this was an exam you took on computer?
A. Yes.

Q. And do you see it's broken down, performance profile, lower performance, borderline performance and then higher performance?
A. Yes.
Q. And would you agree that in several areas your performance was below borderline?
A. Yes.
Q. And whatever reason that was, it didn't have to do with how much testing time you were provided on that testing?
A. No. At that time, I don't believe so. That was right after I had my DVT and had to make up my neuro course.
Q. If you look over on the page that says Ramsay 33 --
A. I'm sorry, you said Ramsay 33?
Q. Yeah.
A. Okay.
Q. And on this particular test, you achieved a score of 310 with accommodations.

And do you see on this page there's a sort of rough forecasting of, if you achieve a particular score on this exam, here's the approximate Step 1 exam?
A. Okay.
Q. And what was the approximate Step 1 exam you would have achieved with a 310 on this?
A. It says 188 as approximate.
Q. That's slightly below what you actually achieved with no

accommodations when you took Step 1?

A. At this time, yes.

Q. How many times did you take that test? Once or more than once?

A. Which test?

Q. The one we just looked at, the comprehensive.

A. I don't know because I don't know what version that was. And the one we just looked at was a self-assessment.

Q. Okay. In this same assessment, it looks like you took it again, if you look at page 57. And it looks like the test date of this document is captioned NBME Comprehensive Basic Science Self-Assessment Performance Profile. And the test date is June 2017.

A. Okay.

Q. And you took it a second time and you got the identical score, it looks like, 310?

A. It looks like it. And this is a CB -- okay. Okay. Yes.

Q. And again, an exam you took with all the accommodations that the school provided?

A. No.

Q. This one you did not have accommodations on?

A. I didn't -- not use the time because I had already been denied accommodations, and so I was trying to simulate what would happen if I had standard time, but I still used the room and -- I think just the room.

Q. So you had a private testing room with no extended time?
A. Yes.
Q. Did the test with no extended time?
A. I didn't test with extended time.
Q. And your score at this point was the same, but you had slightly different testing in that situation?
A. Right. And it was also after third year and it was the day after my surgery rotation ended, so didn't have time to study for it.
Q. Look at Exhibit 68. Is this a subject matter exam that you took as part of your surgery course at school or rotation?
A. Yes.
Q. And this is dated April of 2017 on the second page where it says 174?
A. Okay.
Q. It looks like you got a 67 percent score.
And again, would you agree with me that most of your performance was below average on the score report?
A. For surgery, yes, which is Step 2 content.
Q. And then did I understand you to say that you thought you did better in psychiatry than you did in surgery?
A. I believe so, at least in the overall grade.
Q. Turn to the next page, if you would, 175.
A. Okay.
Q. And is this the results of your psychiatry examination

that you took after your subject matter or for your course?
A. Yes.
Q. And if you look at page 2, is this your score report for how you did on that exam?
A. Yes.
Q. Are subject matter exams taken on a computer?
A. Yes.
Q. And this is an exam you took with double testing time?
A. Yes.
Q. And whatever other accommodations the school provided?
A. Yes.
Q. And would you look at your performance there. Would you agree that in many, if not most, of the categories here, mental disorders, mechanisms of disease, management, emergency department, patient groups for females, your performance was below average?
A. Some of those you listed were on the average performance, but yes, some of those were below.
Q. Look if you would, please, at the page that says 262.
And now it looks like a subject matter exam from August 2016 for family medicine?
A. Yes.
Q. Again, this is a standardized exam you took with extended testing time?
A. Yes.

Q. And other accommodations. And it looks like your score was a 60.

And would you agree that most of your performance categories on this exam, you performed below average?

A. Yes.

Q. So whatever the reason for that performance was, it didn't have anything to do with how much testing time you were allowed on that day to take the exam?

A. No. It had to do with the difficulty of the questions, because they were pretty ambiguous.

Q. And then finally, looking at your medicine exam on page 264.

A. Okay.

Q. Is this an exam you took to evaluate your knowledge and abilities after taking your medicine course at school?

A. Sorry, it was -- you were asking about the medicine course, yes.

Q. Yeah. What is this exam evaluating? What had you just completed before taking this exam?

A. The internal medicine rotation, which was my first clinical.

Q. And again, would you agree that your performance was below average on most of the subject areas?

A. It's below on five of them. The rest are below average or average.

Q. And that was an exam you took with the school's accommodations?
A. Yes.
Q. Look at Exhibit 70 for me.
A. Exhibit or page?
Q. I'm sorry. It's Exhibit 70.
A. Okay. Thank you.
Okay.
Q. All right. And what is this document?
A. This is what is called a student dashboard at my school.
Q. And tell the Court what a student dashboard is.
A. It shows a box and whisker, I think it's called, graph of performance on exams relative to other students.
Q. Is that other students at your medical school?
A. Within my class.
Q. Within your class.
What did you have, approximately 50 students in your class?
A. It varied at the time of year, but approximately.
Q. Okay. All right. And what does the red dot signify on the first page, page 87?
A. The red dot is my score.
Q. And what does the sort of dark shaded gray area indicate on each?
A. Those would be the middle quartiles.

Q. So on many of these, it looks like two of them you're in the bottom, but in more of those you were below the bottom quartile in each of these subject areas as of this date?
A. Yes.
MR. BURGOYNE: Your Honor, I have no other questions.
THE COURT: Very well. Why don't we take --
MR. BURGOYNE: Oh, I'm sorry, we have just mechanics of getting our exhibits in.
THE COURT: Okay. I'll give you a chance to do that in your case.
MR. BURGOYNE: Okay.
THE COURT: All right. Why don't we take our morning break now. We'll be in recess till 11:00.
(Recess at 10:47 a.m. until 11:01 a.m.)
THE COURT: Let's proceed.
Ms. Ramsay, please resume the witness stand.

REDIRECT EXAMINATION

BY MS. VARGAS:
Q. Good morning, Ms. Ramsay.
You had testified a few moments ago before our break about your performance on the shelf exams.
Can you tell us a little bit about your experience in the rotations that ended with those shelf exams?
A. Sure. So first of all, our school is a new medical school, and I was in the first class originally. And so this

was kind of a test run for everybody. And because of that, we didn't have a class ahead of us to kind of show us the ropes or give us pointers on how to manage everything. So we were kind of on our own. And so like I said, my first couple rotations, clinical rotations, were quite a new experience for me, and there was a huge learning curve with that. And because of that, not only because of that, but also just the sheer amount of time we were expected to be in either the clinic or the hospital, didn't leave a lot of time for reading or studying.

And because I am a slow reader and not everything was available in a format that could be -- the Kurzweil could be used on. Or if I was at the hospital, some of their computers didn't have software to read to me. And that's the only place I would get -- be able to have access to whatever that information was, I didn't necessarily get to see all of the information that was being tested on.

In some of the lighter rotations where there was either less reading or there was more time to read for me, I got to more of the material and did -- was able to show that I had gotten to that material because I knew it.

And there -- so it varied based on the rotation.

There was also a rotation at the end which was the psychiatry one, which they didn't tell us that neurology would be included on that and we had our neurology as part of our internal medicine rotation. At least our clinical part was

during our internal medicine, and so I didn't study that part of it before taking that exam.

It's just stuff like that. Because it's their first year, it's our first year, and so there was a lot of like miscommunication. But in general, if I had access to the material and had time to access the material, I would do what I could to learn it. And I generally did a decent job.

But on the -- the testing week, the final week of our block, we had not only the shelf exams, which are the written exams on the computer, we also had OSCEs. And those are clinical tests for like -- with standardized patients where I talked about yesterday, the setup of the note that we had to write. And a lot of times those were based off of reading too. And if I hadn't gotten to the reading for those, then it made it harder for me to state the diagnosis or support that they were looking for in the words that they were looking for. Even if I was close or had the right reasoning or the right question -- I had asked the right questions and done the right exam in the encounter, and that was some of the feedback that I got from my clerkship directors, when I hadn't passed either in the writing portion or the -- coming up with the right diagnosis or the expected diagnosis for that encounter.

And then so that particularly was the neuro OSCE. And I failed it twice. And then the clerkship director pointed me to the reading that the case was from, and I passed it.

In my OB rotation, I also failed that note because I didn't have time to write everything. And so I made sure -- I had the diagnosis and support, but I didn't put that support also in the other paragraphs because I didn't have time. And so I didn't even get credit for that. And she told me that I had a great exam, physical exam, and great questioning of the patient and she could follow my logic there, but -- and those are videotaped for them to view, to grade us. She said I did really well through that, but it just wasn't in my note because -- and she could only grade the note. She couldn't grade what I had asked for the note writing portion.

So I had to redo that one, but...

Q. So you also testified that you had a DVT?

A. I did.

Q. Can you explain what happened?

A. I was at the beginning of my neurology rotation in my -- at the end of my second year, and I -- and during the -- one of the lectures, my leg was bothering me or had been bothering me. And I sort of had this feeling that like, watch, this is probably a DVT. And it was like a kind of a joke in the back of my head. But then it still kept bothering me. So I told Neil about it. And then after -- that was like a Tuesday. And by Friday, my leg -- it had changed. My leg had hurt a lot more and had traveled up my leg.

And then so by Friday evening, my leg was extremely

swollen and very visibly swollen compared to my other leg. And so we went to the emergency department Saturday. And they did an ultrasound and said that I had a clot from my foot up to my hip, basically, all the way up. And they didn't even check the other leg. And they didn't check my IVC, which is the vein that goes back to your heart. And so it could have gone all the way up. And if it had gone all the way up to my heart, I would have died.

So we caught it before that, but they had to put me on blood thinners, Xarelto, which I was on for two years after that. But I was in a lot of pain from that for quite a while, and I missed school for like three weeks.

And in this process, I was trying -- I had to go to a bunch of doctor appointments to try to figure out what was going on, why the clot happened, and dealing with the pain. And I had initially tried to study while I was off to try to keep up with the course, but I realized that with the pain and the meds that I was on, I couldn't do that.

So then I worked it out with my school that during the summer break, which is more intended -- it's a study break that the students -- the rest of my class had before they took the -- that exam, I don't know if it was a CBSSA or the CBSE, but the one that we took in the following June, I believe --

Q. I'm sorry to interrupt.

What is the purpose of that test?

A. That was to see whether -- if we pass that, we could start our clinical exams -- or, sorry, clinical rotations for third year. And if we didn't, then we had to spend one rotation of that doing independent study to study for it and pass it before beginning our clinical rotations. And it would have been a study program with the school.

And so I -- instead of getting that time to study for that exam, that month, which my -- the rest of my class got, I spent that time having to make up my neurology rotation, both the class work and the anatomy part.

And so I -- and then in the very last week of that, I was -- like right before we started school, was the exam.

Q. So yesterday defense counsel reviewed your report cards all the way back to kindergarten.

Did you obtain those grades with or without accommodation?

A. I have -- I attained those with the informal accommodations and all of the help and support I was getting from friends and family and my teachers.

Q. And whose idea was it to provide you with those informal accommodations?

A. My teachers.

Q. Do you know why the teachers decided to provide you those informal accommodations?

A. I don't know for a fact, but I assume it's because they realized I was struggling or needed some extra help,

specifically that help that they could provide to allow me to do the best work that I could.

Q. Defense counsel also asked you about receiving accommodations at OSU in college.

Whose idea was it for you to get those accommodations?

A. Initially it was recommended by my Spanish professor and then again by my organic chemistry professor.

Q. Do you know why they made those recommendations?

A. Both had said that when I had asked them about what I could do to do better in the class or achieve, like just show better what I knew or even learn more to do better, they looked at my coursework and my -- and in the case of my Spanish teacher, my oral tests with her. And both said in a way that, you know, there wasn't much else I could do because I knew the material and it was clear that I knew it by the other things that I had shown, which weren't necessarily timed, and that they thought that just having the extra time would give me the opportunity I needed to show what I knew.

Q. Turning for a moment to the ACT.

On the ACT, did you read everything that was on the test?

A. No.

Q. What did you do when you encountered questions that required you to read the entire question or passage?

A. Moved on to the next question that maybe didn't require that.

Q. And what types of questions based on the reading were you able to answer without reading the passage?

A. A lot of the ones that had formulas or math that I could do, or if it was just factual knowledge, so if I knew the answer based on something I had learned without having to read the passage, which maybe the passage restated what I already knew, but I didn't read it if I didn't have to, so I wouldn't be able to say specifically.

But then for like the verbal or -- I don't know what the section titles are for the ACT. But for the ones that were reading based, a lot of the times it would say a line or a paragraph to go to or a specific word even to think about, so I would focus on those and just read those.

Q. How would you compare your experience taking the ACT with your experience taking the MCAT?

A. Well, for one, the MCAT was like a lot longer time wise. There were more sections with more questions that I remember. And the content was more difficult because it was something for college students. And it included more like sciences, like biology and physics and chemistry, but it also had a writing section and a verbal section.

And from my recollection, the ACT had a guess penalty, guessing penalty. And I'm pretty sure both of them had passages with multiple questions associated with them, and that both of them had multiple questions within the passage, related

questions, not just the ones labeled as passage independent, that you could answer without any or very little reading of the passages.

Q. Do you recall how you scored on the writing sample on the MCAT?

A. I got a score of M, which is kind of a weird scoring system.

Q. Do you remember your percentile rank?

A. I believe it was 31 -- 31st percentile.

Q. Defense counsel asked you yesterday about Step 1.

A. Yes.

Q. How would you compare Step 1 with the MCAT?

A. Well, even though the MCAT had like some topics of science and health, the Step 1 is mostly like health-related. And sometimes there's statistics or social -- social health questions, but that's a very small portion of the questions. It's mostly all health related. And it's -- the questions themselves are not related to a passage. They are the question. And in order to evaluate the information in the passage -- or sorry, evaluate the information in the question for Step 1, in order to answer the question, you have to read the whole question for each question. And you can't skip information. There's no like line it directs you to. It's all information related to that patient or that disease or whatever it's trying to have you analyze in order to answer the

question. And so you can't skip reading like you could with the MCAT or the ACT that had a long passage and then several questions associated with it.

Q. You testified earlier this morning that you enjoy being read to?

A. Yes.

Q. Who reads to you?

A. Neil, sometimes my parents, my friends will. I had a friend in -- when I was between undergrad and middle -- undergrad and medical school who was reading the Game of Thrones book series, and so every now and then she would invite me over and she would read the Game of Thrones series to me. And she would do like the little voices for each character, which was cool. And a lot of my friends read -- like if I'm watching a movie, they know that if there's captions at the bottom, that I can't read fast enough. My parents do this too. But they'll read it for me. That's less enjoyable and more necessity, but it's a lot more enjoyable to watch the movie if they're doing it and I don't have to pause it to do it.

Yeah. I've pretty much always enjoyed -- like I enjoy the story, pretty much like I feel anybody would, except for that. It's -- I don't know. There's that personal connection, too, with somebody reading to you.

Q. Do you ever read for pleasure on your own?

A. No.

Q. Why is that?
A. It's work for me. It's hard work. And even if I want the story, that act of reading it is not enjoyable and it takes forever. And so it's not -- it's not an activity that I would choose to do for fun or leisure or however people describe it. It's work for me.
Q. If you withdraw from medical school, can you be readmitted if you have not passed Step 1?
A. No.
Q. And can you take Step 1 if you're not enrolled in medical school?
A. No.

MS. VARGAS: No further questions.

THE COURT: Any recross?

MR. BURGOYNE: Just a couple of quick questions, Your Honor.

RECROSS-EXAMINATION

BY MR. BURGOYNE:
Q. Ms. Ramsay, you testified about your performance on the writing section of the MCAT exam?
A. Yes.
Q. And you performed I think at the 31st percentile.
There's no writing component to the Step 1 exam, is there?
A. Not Step 1.
Q. And then I think you indicated on the ACT exam, if you got

to a question that you couldn't answer, you just moved on to the next question if it required reading?

A. Yes.

Q. And do you recall you scored in the 97th percentile on the ACT exam?

A. Yes.

Q. And your reading scores in arts and literature were in the 99th percentile?

A. Yes.

Q. You said the MCAT is a longer exam than the ACT, and it also includes some science and biology?

A. With longer, I think I was referring to the time that it was scheduled.

Q. Okay. The amount of time the test takes?

A. Yeah. I don't know about word count because I don't have access to those exams.

Q. And again, you refer to a guessing penalty, but do you recall yesterday we saw in the ACT booklet that ACT says there is no guessing penalty on the exam?

A. That's what it says, but, again, my recollection is that there was.

MR. BURGOYNE: Okay. No further questions.

THE COURT: Very well. You may step down now, ma'am. Watch your step.

Next witness.

MR. BURGOYNE: Your Honor, we have I guess a scheduling question.

Our preference is to sort of continue on with plaintiffs putting on their case and us putting ours on. Our experts aren't available tomorrow but are available a week from Friday, or Friday. We can have at least one of them available Friday, I think.

THE COURT: Surely you jest.

Why wouldn't they be available pursuant to us scheduling this hearing for this week?

MR. BURGOYNE: Well, again, Your Honor, it was our understanding initially it was a one-day and then it was a two-day hearing, so it wasn't our understanding it could continue for a third, so I apologize.

THE COURT: Well, this is a second day, and so where are they?

MR. BURGOYNE: They're here, Your Honor.

THE COURT: All right. We can get to them.

MR. BURGOYNE: All right. We'll take them out of order and we'll put ours on next?

THE COURT: If necessary, but you can't --

MR. BURGOYNE: Okay.

THE COURT: You're looking at my scheduling and you're attempting on a Friday and that's not conceivable.

MR. BURGOYNE: Okay. That's fine, Your Honor. We

thought we would check with you and see if that was a possibility.

THE COURT: Very well. Yes.

MR. BERGER: Yes. And we will accommodate that. But I then need a moment to consult with Dr. Smith, who would otherwise be the next expert, because he has to rearrange his schedule.

THE COURT: Fine.

MR. BERGER: So if I could just have two minutes --

THE COURT: You've got two minutes right now.

MR. BERGER: Thank you very much.

MR. BURGOYNE: And we'll get our witness.

THE COURT: You said they're not going to be long in any case?

MR. BURGOYNE: One is very short. The other one is a little longer.

(A discussion off the record occurred.)

THE COURT: Let's proceed. We'll have you call your witness out of order.

How long is your expert witness, just out of curiosity?

MR. BERGER: I estimate that his direct will be between an hour and an hour-and-a-half, but I think closer to an hour. And I don't know about their cross, obviously.

THE COURT: Cross-examination.

Very well. Why don't you call your witness.

MS. MEW: Thank you, Your Honor. The defense calls Dr. Benjamin Lovett.

THE COURT: All right. Watch your step coming around there and around this.

THE WITNESS: Thank you.

DR. BENJAMIN LOVETT, after having been duly sworn, was examined and testified as follows:

COURT REPORTER: State your name for the record.

THE WITNESS: Benjamin Lovett.

DIRECT EXAMINATION

BY MS. MEW:

Q. Good morning, Dr. Lovett.

A. Good morning.

Q. Are you an external consultant for NBME?

A. Yes.

Q. And how long have you been serving in that role?

A. I believe it's been nine years. I think I started in 2010.

Q. And briefly, what do you do in that role?

A. For NBME, I review cases that are sent to them, applications for accommodations. So typically I'll get an email that asks me to go to a secure website. I download a file that has the documents that the applicant has submitted, review those and write a review with some sort of

recommendation. Or if I can't provide one, I give it still a summary of the documents.

Q. And what questions does NBME ask you to answer as you're reviewing accommodation requests on the USMLE?

A. One thing I consider is whether or not the applicant meets criteria for the diagnoses that they have requested accommodations under. If they have, then I also ask a question of whether or not they're substantially limited in any major life activities that are relevant to taking whatever tests they've asked for accommodations on. And then, if appropriate, I recommend or summarize evidence with regard to what accommodations, if any, are indicated based on the evidence that's been submitted.

Q. And did you review Jessica Ramsay's request for accommodations in the US MLE?

A. I did. I wasn't an initial reviewer, so I saw I believe it was her request for reconsideration.

Q. And is it your understanding in reviewing that request for reconsideration that you saw her entire file, all of the documentation she had submitted to the NBME up to that point in support of her requests?

A. It is, yes, that I saw all the evidence that she had submitted up to that point.

Q. And did you provide a written analysis and recommendation to NBME with respect to her request?

A. I did.
Q. And then did you also provide a declaration in this litigation relating to Ms. Ramsay's testing accommodation request?
A. Yes.
Q. Dr. Lovett, I'm going to ask you to turn to Exhibit 6 in the defense exhibit book, which should be a black binder, the first volume.
A. Okay. Let's see. Okay.
Okay. I'm there.
Q. You're going to be quicker than I am.
A. That's okay.
Q. Do you recognize this exhibit with the beginning document, the declaration that you submitted in this litigation?
A. Yes.
Q. And then Tab A to Exhibit 6, do you recognize this as your CV?
A. Yes. As of the time the declaration was submitted.
Q. Understood. And then Exhibit B, is this the letter that you submitted to NBME containing your analysis and recommendation on initially reviewing Ms. Ramsay's request for reconsideration?
A. Yes. That's my review of the documentation.
MS. MEW: Your Honor, this is in the record in terms of being filed in support of our preliminary injunction

opposition, but we'd also ask to admit Exhibit 6 to the record today.

THE COURT: Very well. Hearing no objection.

MR. BURGOYNE: No objection.

THE COURT: It's admitted.

(DX-6 admitted.)

BY MS. MEW:

Q. Dr. Lovett, we are going to get into more details very shortly, but could you briefly state the opinion that you reached regarding Ms. Ramsay's request for testing accommodations based on the materials that she submitted to NBME in support of her request?

A. Sure. Ms. Ramsay had requested accommodations under several different conditions or diagnoses. And my expertise is in learning disabilities and ADHD, so I reviewed with regard to those. And that really applies to pretty much all of the testimony that I'm giving.

And my conclusion is that there was insufficient evidence supporting learning disabilities or ADHD. And there was actually some pretty significant evidence undermining those diagnoses, arguing against the learning disabilities in particular.

Q. And then since the time that you even prepared your declaration in this case, have you reviewed additional material that's been produced during the discovery? And I'm speaking

specifically with regard to Ms. Ramsay's school records, the report cards and additional standardized test scores that we've been discussing in the hearing.

A. Yes. Those have been provided to me, and I have reviewed them.

Q. Have the opinions that you expressed in your declaration and in your written report for NBME changed in any respect with regard to this additional information?

A. No. The school records and especially the standardized test scores actually really strengthen the argument against the learning disabilities. And things like the excellent scores for attention or excellent ratings by teachers for attention in the report cards further weaken the argument for ADHD and more undermine that diagnosis as well.

Q. And we're going to get again into a little more detail of that, but before we do so, I'd like to talk just a bit about your background and credentials.

We can reference your CV, which is Exhibit 6A, Defense Exhibit 6A.

If you'll just briefly state your educational background.

A. I have a bachelor's degree in psychology from Penn State University, a master's degree in psychology from Syracuse and a doctoral degree, a PhD in school psychology, from Syracuse as well.

Q. And where do you currently work?

A. Teachers College, Columbia University in New York City.
Q. And how long have you been in that position?
A. Just for a few months. I've -- since September 1, 2019 officially, as it says on the CV.
Q. Okay. And where were you before then?
A. Before then, for five years, I was a professor achieving tenure at the State University of New York at Cortland. Before that, I taught for seven years at a small liberal arts college, Elmira College.
Q. Do you have any particular specialties in your work?
A. Learning disabilities and ADHD, specifically their diagnostic assessment. And also the provision of testing accommodations to students with disabilities. Most of my work, pretty much all of my current work, is on one of those two things or both.
Q. And what are your primary job responsibilities as a professor?
A. As a professor, teaching, research and service. They're sort of the three things professors do. So I teach classes at Teachers College, I train graduate students who are becoming certified school psychologists, and some of them will become researchers as well. So I teach courses on law and ethics for school psychologists, for instance.

I was brought there, really, to take over the assessment courses, and so I'll start those in the spring semester. So

that's teaching.

In terms of research, I present at conferences, giving -- I do talks. I publish in peer-reviewed journals. I published a book on testing accommodations.

And then with regard to service, that involves things like sitting on committees, advising students, other sorts of informal mentoring and that sort of thing.

Q. Focusing particularly on your research work, if we could look at Exhibit 6A, which is your CV, pages 2 through 9.

Is this a listing of your publications and works in progress, including publications in peer-reviewed journals?

A. Yes.

Q. And focusing specifically on your peer-reviewed journal articles, does any of this research pertain to learning disabilities or ADHD?

A. Yes. Many of the articles are about learning disabilities and/or ADHD.

Q. And what types of journals are you publishing in?

A. Journals in the fields of psychology and education, specifically journals on assessment issues, journal on school psychology, things like that.

Q. And you mentioned that you have been invited to give -- to speak to different groups.

Now, can you give examples of some of the groups that you've been invited to present to?

A. Sure. Currently a lot of the talks that I give are actually to schools. So I speak to teachers. I speak to school administrators, groups of school psychologists. In addition, I've done continuing education workshops for psychologists, those who do evaluations, things like that. I've also given invited talks beyond that to reviewers, for instance, of documentation. I've given invited talks at conferences, things like that.

Q. And just briefly, focusing on your teaching, if we look at page 16 of your CV, is this an accurate listing of the courses you have taught?

A. As of that date, yes.

Q. So you might have some additional courses you're now teaching at Columbia?

A. Right. There's one this semester.

Q. And do you teach classes that address learning disabilities and ADHD?

A. Yes. And I have for many years now.

Q. Dr. Lovett, are you a licensed psychologist?

A. I am.

Q. What does it mean to be a licensed psychologist?

A. In New York state, at least, the requirements for licensure are education, experience and examination passing.

So you have to have a doctoral degree from an appropriate institution. You have to have thousands of hours of experience

supervised doing various sorts of psychological practice, assessment consultation and intervention. And then you also have to pass a licensure exam.

Q. Do you see patients or clients as part of your work?

A. I don't. I don't have a clinical practice. I occasionally do clinical consultation, but I don't have a clinical practice.

Q. And do you currently perform diagnostic evaluations as part of your work?

A. No.

Q. Have you ever performed diagnostic evaluations?

A. I've been part of teams certainly in school and clinical settings doing them, but not presently. And that was during my training as part of that supervised experience.

Q. Are you familiar, nevertheless, with the diagnostic tests that were administered to Ms. Ramsay by Dr. Smith and her other evaluators?

A. Yes. I've given many of them myself for research purposes, for training purposes. And even those that I haven't given myself, I'm familiar with their content and format in general.

MS. MEW: Your Honor, the defense offers Dr. Lovett as an expert witness in the evaluation and diagnosis of individuals with learning disabilities, ADHD, as well as the provision of accommodations and testing and academic

environments and research related to this.

THE COURT: Very well.

MR. BERGER: Your Honor, I think my comments have more to do with weight than overall expertise. So certainly we acknowledge that by education and training, Dr. Lovett has expertise in these areas Counsel has brought out. And he does acknowledge that he does not have a clinical practice. And that will, of course, be something that I will examine about and will give -- there will be some arguments, therefore, about the weight.

So with all that, we don't object to allowing this to proceed, but I may have particular points to make later on about his expertise in particular areas.

THE COURT: Very well. We find the witness to be an expert in the area that has been stated by counsel.

You may proceed.

MS. MEW: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. MEW:

Q. Dr. Lovett, when you are reviewing a request for accommodations on the USMLE like Ms. Ramsay's, do you meet with that individual in person as part of your review?

A. No.

Q. So how are you able to assess whether that individual has an impairment or should be receiving testing accommodations on

the test?

A. Based on the documentation that they've provided. And that documentation virtually always involves records and reports from individuals who have met with them personally.

So I can't think of a case of a diagnosis of learning disabilities or ADHD where an applicant has not submitted letters or reports, records, from someone who performed an evaluation personally.

Q. And so you are looking to the information that they themselves have put forth in support of their request?

A. Exactly. For NBME in particular, I believe that I see all of the documents that are submitted even if there's email correspondence between the applicant and NBME.

Q. And are you familiar with other -- in other contexts where there are other reviews of individuals' impairments or levels of disability for purposes of receiving services in other contexts where the review might be solely based on paper, as opposed to an in-person meeting?

A. Generally, yes. I have colleagues who review for disability, not so much under ADA but workmen's compensation and other sorts of things. And my understanding is that at times there's no personal evaluation.

Q. And let's focus now on your review of Ms. Ramsay's file.

And just starting first with logistics, how did NBME reach out to you to review her file?

A. In her case, I believe, just like in virtually all cases with NBME, I got an email one day asking me to log in to a secure website because there was a review that had been deposited for me to look at. And so I went to that website, logged in and downloaded a file of documentation, a PDF file of all the papers that had been submitted.

Q. And did you have any communication with NBME about the substance of this file before you began your review?

A. I don't believe so. I don't recall any communication in this case. And the years that I've been working with NBME, I can only remember a handful of times when I've communicated with them about a file before writing a report. In those cases, it's because there's a piece of paper that's illegible or there's a piece a paper that seems to be like missing a page or something like that, maybe when it was photocopied. And in this case, I certainly don't recall anything like that.

Q. And then between the time you reviewed the file and you wrote the report that was attached as Exhibit B to your declaration, did you have any communications with NBME?

A. Again, I don't recall any, and it would have been extremely unusual.

Q. And then after you submitted your report to NBME, did they suggest any revisions or changes to the report that you wrote?

A. Just the same thing, I don't recall any. I don't believe there were any communications at that point. And it would be

extremely unusual to hear anything. In the vast, vast majority of cases after I turn in a review, I don't hear anything at all.

Q. When Ms. Ramsay requested accommodations on the USMLE, which diagnoses or impairments were the basis for her request?

A. She requested accommodations under learning disabilities and reading and writing, ADHD, headaches and a clotting disorder.

Q. And as you previously stated, your testimony today is focusing on the learning disabilities and ADHD. Correct?

A. Exactly.

Q. Okay. Can you very briefly explain the diagnostic features of ADHD?

A. Sure. To have ADHD, someone not only needs to have episodes or instances where they have trouble paying attention or impulsive or overactive/hyperactive, but they have to be often and they have to be frequent. They have to be to a level that's atypical and very unusual for their age. And so that's just one of the criteria. You have to have very high levels of symptoms.

The second criterion is that they have to start early in life. So they have to be present -- you have to have some symptoms by age 12.

The third criterion is that they have to be present in multiple settings. If someone is only showing symptoms at

school, for instance, that's not ADHD.

A fourth criterion is that they have to interfere with someone's performance. If someone has those symptoms but they're doing fine, that's not ADHD. It may be a personality profile or a personality trait or set of traits, but it's not a disorder. Disorders involve impairment.

And then finally, it can't be due to something else. So if someone is having high levels of those symptoms because of -- just because of drug use or something like that, we wouldn't call that ADHD. So those are the five criterion for ADHD.

For learning disabilities, the core sort of --

Q. Let me stop you. Let's stay on ADHD for just a minute.

A. Okay.

Q. What are some of the traits or characteristics that are represented in the sort of symptom criteria for ADHD?

A. Sure, yeah. So there are 18 symptoms that are listed in the DSM for ADHD. Nine of them have to do with inattention. Those are things like making careless mistakes, being easily distracted. The other nine have to do with hyperactivity and impulsiveness. Those are things like talking excessively, you know, being impulsive, reacting before you should, things like that.

Q. How do you differentiate individuals who have these types of traits, maybe not to a clinical level, in individuals who

experience these traits to something that would constitute ADHD?

A. Yeah, these are things that I had sort of mentioned earlier. So one is certainly the frequency. Again, everyone has experiences where they have trouble paying attention in certain settings, where they have to work harder than others to pay attention or focus. We all have experiences where we feel jittery. We all have experiences where we act impulsively and then regret it later and things like that. But the frequency is one thing. So frequency and severity, we can sort of put those together.

And then another feature would be the impairment, the fact that it's actually causing problems for someone, if they are experiencing significant negative consequences and then the symptoms continue.

So for most of us, when we experience significant enough negative consequences, we learn, we adapt, we change sort of the way that we're behaving. For individuals with ADHD, those negative consequences bother them. They really cause them some distress, but they continue to engage in those behaviors. And so it's something that really causes a substantial level of impairment typically.

Q. And what would be an example of a substantial level of impairment?

A. So depending on the symptoms, it would differ, but for

someone who, for instance, a schoolchild with ADHD, we would expect them to be doing poorly in school. So if someone has ADHD to a significant degree such that they meet the criteria for clinical diagnosis, we would expect that they have trouble remembering to turn in work, to the point where their grades are affected, but they continue to not turn in work despite those negative consequence. We would expect that they're not paying attention to the teacher and so they're actually not getting instruction in the sense. So we would expect that to be reflected in terms of their school performance as well. Those are the sorts of things for a schoolchild, for instance, with inattention.

Q. And we were speaking about school, but is ADHD a learning disability?

A. No, no. Technically ADHD would not be considered a learning disability. Those are separate categories in the classification system.

Q. So could someone have ADHD and have no functional impairment, say, in reading or writing?

A. Yes. I certainly have seen cases where folks who I think have a valid diagnosis of ADHD nonetheless do well in reading and writing for various reasons.

Q. And then you were starting on this and I stopped you. But now if you could just briefly discuss the diagnostic criteria for specific learning disorders?

A. Yeah, absolutely. So learning disabilities involve trouble acquiring academic skills initially, reading, math or writing skills or some grouping of those. And in addition, that's reflected in terms of poor performance on standardized tests. That's actually something that's in the diagnostic criteria as well as poor performance in real world settings, educational or occupational performance. Those things are noted in the criteria.

And then also those deficits can't be due to another disorder or another problem. Like, for instance, if someone has a general low ability, then that could explain academic problems, but we wouldn't call that a learning disability.

Q. And so what kind of objective evidence are you looking for in determining whether someone meets a diagnostic criteria for a learning disability?

A. There are really two types of evidence that I look for as a reviewer. One is evidence from diagnostic tests that are administered by, you know, an evaluator, and then the second sort of evidence is from real world settings, because we really need both. So the real world evidence would include things like grades on real world standardized tests that are taken for admission purposes or for, you know, group tests that are given in schools but under a standardized set of conditions, as well as grades and other records of school performance. Those are in that second grouping of real world evidence.

Q. If an individual has sort of uneven strengths and weaknesses, let's say, really superior math skills or above average math skills but perhaps just average reading skills, is that sufficient to show a learning disability?

A. No, absolutely not. It is typical to have a profile of strengths and weaknesses in the sense of having some things that you're better at than other things. We all have some personal strengths, we all have some personal weaknesses in that sense of the term. And so if your math skills are better that your reading skills, that by itself doesn't mean anything.

I should also mention individuals with higher levels of ability tend to have more variability across areas.

Q. Are you familiar with the concept of individuals who are both gifted and learning disabled?

A. Absolutely.

Q. What does it mean to be gifted?

A. Traditionally giftedness was defined rather narrowly based on a high IQ score, an IQ score above 120 or 130 in some cases. There's no official definition of giftedness in a diagnostic manual. And these days, different school districts have different criteria for entry into giftedness programs. Many still use IQ tests, but they also may use tests of academic skills, creativity tests as well, parent and teacher ratings, things like that.

Q. Is it possible to be both gifted and learning disabled?

A. Absolutely. There's no reason why someone, you know, cannot have significant deficits in academic skills even if they meet those various criteria to be called gifted.

Q. And how would you expect that to present itself?

A. We would see evidence of both meeting the gifted criteria and also separately distinctly meeting the criteria for a learning disability.

So whatever your preferred definition or whatever a school district is using as a gifted criteria set, they would be meeting those, and in addition, they would meet the requirements for a learning disability separately.

Q. And does a learning disability require some level of impaired performance?

A. It's the core definition of it. Academic skills are substantially and quantifiably impaired. Substantially and quantifiably is the term in the diagnostic criteria.

Q. What is the discrepancy theory?

A. For a long time, starting back when the concept of learning disabilities was first developed, it was thought initially that learning disabilities should be diagnosed by looking at a discrepancy between someone's IQ and someone's level of achievement.

And so for a long period of time, the diagnostic criteria, the clinical diagnostic criteria for learning disabilities involved some sort of calculation of that discrepancy. So you

would administer an IQ test, you would administer a test of academic skills. And if there was an area where there was a significant gap between IQ and achievement, then that was part of the criteria for a learning disability.

Research accumulated over the course of a decade showing that those discrepancies are not reliable and also that they're not a valid indicator for many reasons. And so when the diagnostic manual that's most commonly used, the DSM, was revised, it was actually revised specifically to address that problem. And so the discrepancy criteria are gone. And that's been since 2013 at the latest, at least. But the discrepancy approach has been under attack by researchers whose data continue not to support it for decades.

Q. And just for the record, when you're referring to the DSM, what are you referring to?

A. That's the Diagnostic and Statistical Manual of Mental Disorders, currently in its fifth edition, so that would be the DSM-5.

Q. And so if I understand it correctly, under the discrepancy theory, someone could potentially be diagnosed with a learning disability if they had an IQ in the 95th percentile but academic scores in the average range?

A. In theory, yes. When the discrepancy formulas and the discrepancy criteria were originally developed, it was never anticipated, I think, but it would be applied to folks like

that. The thought was that to be referred for an evaluation to see if someone has a learning disability in the first place, they would actually be doing poorly academically, they would actually have low academic skills. And I think it was a later application or misapplication to individuals who were not impaired academically.

But it is true that under the discrepancy approach to diagnosis, in theory, someone certainly could have average range achievement and still qualify as having a learning disability because they were not performing up to their ability. The idea was that IQ was the sort of measure of your potential and you were entitled to perform in every area up to your IQ. We know for a lot of reasons that's wrong.

Q. So within your profession, that is no longer an accepted method for diagnosis?

MR. BERGER: Objection. I think at this point, on a question like that, that counsel is leading her own witness more than is appropriate.

THE COURT: You can rephrase your question.

BY MS. MEW:

Q. Is the discrepancy model currently accepted in your profession?

A. I don't know any researchers who would endorse it, folks who specialize in looking at evidence and conducting scientific studies of learning disabilities. Are there practitioners, are

there evaluators who use it, at times, yes.

Q. Are ADHD and specific learning disabilities neurodevelopmental disorders?

A. Yes. That's the category in the DSM that they're called, neurodevelopmental disorders, because they are understood to be brain based and to start early in childhood.

Q. Okay. You anticipated my second question. Thanks.

So now focusing back on your review of accommodation requests, what type of information are you looking for when you review a file for a candidate who requests accommodations on the USMLE?

A. Well, it depends on the disorder. So, again, for learning disabilities, it's the two types of evidence that I just -- I discussed earlier. So one thing that I look for is evidence from standardized diagnostic tests that are given by an evaluator showing scores that are below the average range in terms of academic skills, and then the second type of evidence that I look for is real world evidence. So evidence of poor grades, evidence of poor performance on real world tests that are taken without accommodations.

Q. Ms. Ramsay submitted a report from Dr. Robert Smith in support of her request for reconsideration.

Are you familiar with that report?

A. Yes.

Q. If you'll turn to Defendant's Exhibit 3 and Tab B behind

that.

A. Okay. I'm there.

Q. Is this the report from Dr. Smith that you reviewed as part of your review of her file?

A. Yes.

Q. Looking at the first page of this report, Dr. Smith lists a number of sources of information. And focusing here on the items in caps, I'm going to take them a bit out of order. I'm just going to ask you to just very briefly explain what some of these tests are.

One of them is the Nelson-Denny Reading Test.

A. Uh-huh.

Q. Is this a diagnostic test?

A. The Nelson-Denny, that one is a little bit complicated because it was -- it's generally interpreted to be a screening test, but it can provide useful evidence relating to a diagnosis of reading problems.

Q. And what does it measure?

A. It measures reading skills. It has a component that looks at someone's ability to take a vocabulary test through reading. It has another component that looks at reading comprehension, where someone reads passages and then answers multiple choice questions about the passages. And it generates sort of a supplemental score, called reading rate, that is really not reliable even according to the Nelson-Denny manual, but that's

part of the comprehension portion.
Q. Did Ms. Ramsay obtain any below average scores on this test?
A. Yes.
Q. And if it helps, you can refer to pages 22 to 23. And it's of the report, not -- the page in the actual report, not the page numbers on the top that show the court filing.
A. Okay. Yes, I'm there.
Q. What were Ms. Ramsay's below average scores on this test?
A. So according to this report, her vocabulary score was below average at the 11th percentile. The 11th percentile would generally be considered, in many tests, the low average range, I should say. And that 11th percentile score did compare her to graduating college seniors. But compared to that group, her scores were below average.

I should mention, in the DSM -- the performance doesn't just have to be below average, it has to be below average compared to age expectations.

And so the Nelson-Denny doesn't directly show any sort of age comparison. Dr. Smith also compared Ms. Ramsay's performance to those of graduating high school seniors. And that's often done for the purposes of getting something that roughly approximates a general population sort of comparison.

That showed that her comprehension score was low average at the 18th percentile. And her reading rate score, the

unreliable score, as I mentioned, even the manual shows to be so, was at the 1st percentile, at the very bottom.

Q. Why does the manual state that that reading rate score is unreliable?

A. Well, there are ways of calculating a test's reliability. And here it was done, I believe, by correlating the two forms of the Nelson-Denny test. And the correlation between those two forms was below what's generally considered to be a minimally accepted level of reliability.

So .7 is often described as minimally acceptable. And if I recall correctly from the manual, I think the reliability of the reading rate score is .68.

Q. And how is the reading rate score measured?

A. So during the comprehension portion of the Nelson-Denny, someone starts reading the first passage on the test. And one minute in, you stop them and ask them basically to indicate where they are.

So it's a -- it's -- you're essentially asking someone how far they've gotten, but there's no check on their comprehension for that reading rate score. And it's just based on one minute of their silent reading with no comprehension check.

Q. And so if these scores, the ones that you mentioned, the reading rate score in particular, if the 1 percent score is accepted at face value, what would it reflect?

A. If we put aside the issues with reliability, it would

suggest that her reading speed is in the bottom 1 percent, even compared to high school students, high school seniors in this case.

Q. And did Dr. Smith also administer the Wechsler Individual Achievement Test, Third Edition?

A. Yes.

Q. And is that commonly referred to by acronyms, like WIAT, WIAT?

A. Yes, I've always heard the WIAT, or that's how I was trained, but WIAT is another pronunciation.

Q. W-I-A-T. What does this test measure?

A. The WIAT is a general achievement battery, so it measures academic skills in a bunch of areas, reading, math, writing, as well as oral language.

Q. Did Ms. Ramsay obtain any below average scores on this test? And if it helps, I think this is page 18.

A. Okay. Yes, she did. On the WIAT, the main score that I would say was below average, in this case described as far below average, was her oral reading fluency score.

Q. And what was that score?

A. That was based on her reading passages aloud and looking at the speed that she took to read those passages.

Q. And then what actual score did she receive?

A. She received a 67, where 100 is average. And so that was at the 1st percentile.

MR. BERGER: Can I just ask for a page reference?

MS. MEW: Oh, I'm sorry, yes. Page 18 of 31. I'm using the report page numbers, not the court filing numbers.

THE WITNESS: There's a table of scores there.

BY MS. MEW:

Q. And so if we took that score at face value, what would it indicate?

A. That would, again, suggest that her reading speed or fluency, which includes, actually, a bit of comprehension, was in the bottom 1 percent. And the WIAT compared her to age peers. So that would have been compared to other folks her age at the time, her reading fluency was in the bottom 1 percent of the population approximately.

Q. Did Ms. Ramsay also take the Woodcock-Johnson IV Tests of Achievement?

A. Portions of those tests, yes.

Q. Which portions did she take? Which portions did Dr. Smith administer?

A. Let me look for them.

Q. And this is page 21.

A. Okay. So she took, at the very least, the sentence reading fluency test and -- the sentence reading fluency test and the word fluency reading test. And together the scores on those two tests are used to make an overall composite score called reading rate.

Q. And did Ms. Ramsay obtain any below average scores on these tests?
A. All of her scores, the overall reading rate and the two subscores that it's made of, are below the average range certainly, even below the low average range.
Her overall score for reading rate is at the 1st percentile. So again, that would be the -- approximately the bottom 1 percent of the population.
Q. And when you say the population, is that age based or --
A. In this case she was, again, compared to age peers.
Q. So this is saying that she's performing at the 1 percent level, 99 percent of her same age peers perform better?
A. Taken at value, that's approximately -- taken at face value, that's approximately the interpretation here.
Q. That's what it would be.
And then did Dr. Smith also administer the Gray Oral Reading Test, or the GORT?
A. Yes.
Q. Okay. This is pages 21 and 22.
And what does this test measure?
A. This test measures oral reading skills, both with regard to accuracy and fluency, as well as comprehension.
Q. And how does it measure that?
A. So the individual reads a series of passages that get progressively longer and more difficult. And after each

passage, after reading it aloud, the passage is removed and the individual answers comprehension questions about it. While the client is reading the passages, the examiner notes whether or not errors are made, as well as the time that's taken, things like that.

Q. And did Ms. Ramsay obtain any below average scores on these GORT tests?

A. Yes. So her rate score was 3, which is at the first percentile. Her accuracy score, in terms of errors being made, was also below average. Her fluency score is made up of the rate and accuracy scores, so it, too, unsurprisingly then is below average. And her comprehension score was also very low, a 3, where 10 is average in this case. And her score was 3 and, that was at the 1st percentile as well.

Q. And so again, taken at face value, what would these scores reflect?

A. Extremely poor reading skills with regard to a variety of different areas of reading. Not just the speed, but also things like accuracy and comprehension.

Q. And falling at the 1 percentile, who is that compared to?

A. That was compared, not exactly to age peers, because the GORT doesn't quite go up to Ms. Ramsay's age range, but to a sample of the general population, I believe, of 19 to 23 year olds.

Q. So with respect to the below average scores on these

various tests we just discussed, in your opinion, are those scores credible?

A. No.

Q. And what do you mean first when we're talking about -- credible, what do you mean when you're discussing a credible score?

A. Yeah. Non-credible is a term that's used in the scientific research literature with regard to assessment. So when someone takes diagnostic tests and they get scores that, for whatever reason, are not accurate representations of their true skill levels, that could be called a set of non-credible scores.

Q. And so why is it your opinion that these scores are not credible?

A. Because of the overwhelming real world evidence to the contrary.

Q. And what real world evidence are you speaking of?

A. Things like performance on admissions tests, like the ACT and MCAT that were taken without accommodations. Performance on group administered standardized achievement tests in school, in Ms. Ramsay's K to 12 education, grades, things like that.

Q. So what should an evaluator do when faced with inconsistencies between real world performance and results of diagnostic testing?

A. Well, there are a number of reasons that can cause

non-credible data, and so you want to think about what mechanism might explain them in a particular case.

So, for instance, if you're evaluating someone who is just recovering from the flu, then you're probably not getting an accurate representation of their skills, if you see that they perform much worse on a diagnostic test that day than they do in the real world during most of their life. And so that would be one thing to consider. It doesn't seem to be operating in this case.

Another mechanism that would have to be considered is motivation. So in real world contexts, especially in admissions tests, the individual is motivated usually to perform as well as they possibly can. The goal is to do something like get into college, get into a good medical school, things like that.

In contrast, that motivation, that incentive, is not there in diagnostic testing. And sometimes in diagnostic testing it's the opposite. So if someone is already contemplating getting accommodations, if someone already believes that they need accommodations, then if they perform well during the diagnostic testing, then they're not going to get a recommendation for accommodations.

Q. Are there ways that the clinician can test for this motivation?

A. There are specialized assessment measures that have been

developed to try to look at someone's motivation or effort level during an assessment, but the discrepancy between the real world evidence and the diagnostic testing would actually be to me the most clear evidence that there's something wrong with the diagnostic test scores. But there are specialized assessment measures that have been developed.

Q. What are performance validity tests?

A. Performance validity tests are a type of those measures that look at someone's motivation or effort during diagnostic testing. And they were generally developed to look at feigned memory problems or exaggerated memory problems or otherwise non-credible memory problems. A lot of them were developed for use or have been used in civil litigation where someone is alleging an injury that may have occurred, say, during a car accident, someone says that they have memory problems afterwards. And that test is given to detect if their memory problems are genuine or exaggerated or feigned.

Q. And so did Dr. Smith administer one of these types of tests?

A. He did. He gave the Test of Memory Malingering, which, as its title suggests, was developed to look at feigned memory problems or exaggerated or non-credible memory problems.

Q. And how -- very briefly, how does this -- what does this test measure? How are you --

A. In the Test of Memory Malingering, you show someone -- to

make it very simple line -- drawings of different common objects, like a door or a saw or something like that. And you show them sets of these and then ask which they've seen before and which they haven't, things like that.

Q. Is there any reading involved on this test?

A. No.

Q. How did Ms. Ramsay perform on this test of memory malingering?

A. In Dr. Smith's report, he describes the two parts of the Test of Memory Malingering that are typically used to score at, Trial 2 and the Retention trial. And I believe she got perfect scores on both of those, suggesting that she -- if those are taken to mean what the Test of Memory Malingering normally means, it suggests that she was not exaggerating or feigning any memory problems.

Q. So in this case, does that explain away the discrepancy between the diagnostic tests and the real world performance that you referred to?

A. No, it would have nothing to do with that. In this case, especially by the time that Ms. Ramsay saw Dr. Smith, as she testified to earlier today, she needed evidence of slow reading. She obtained evidence of slow reading. The Test of Memory Malingering never would have picked up on slow reading, whether it was genuine, exaggerated, feigned, credible, non-credible.

Q. Focusing now, or switching to ADHD, Dr. Smith administered or utilized assessments relating to attention; is that correct?
A. Yes.
Q. What are the adult ADHD rating scales? And you know what? Let's look at Defendant's Exhibit -- let's look at Defendant's Exhibit 76.
A. Okay. 76. I'm there.
Q. Oh, 46, 46. My apologies, all.
A. Okay. I'm at 46.
Q. You still beat me there.
So are these the adult ADHD rating scales with adult prompts?
A. Yes.
Q. And so just briefly explain, what are these rating scales used for?
A. So these are used as part of a diagnostic assessment for ADHD. So I had mentioned earlier that there are 18 official symptoms of ADHD in the DSM. And you see those listed here.
And in addition, you see more specific prompts, questions that can be asked that are more adult specific. So the ADHD criteria were originally developed long ago for children. It was thought of as a childhood disorder. We know that certainly there are cases where it continues to adulthood. It still has to have childhood onset, but it has to -- but it can continue to adulthood. And so there have been criteria for -- or I

should say there have been assessment measures developed that have more adult-specific examples of DSM symptoms.

Q. If you look at pages 60 and 61 of Exhibit 46, it looks like these are Ms. Ramsay's scores that she applied on this rating scale.

What do these ratings convey in terms of her symptoms and the level of severity?

A. It appears that when Ms. Ramsay rated each of her 18 symptoms in a sort of overall way, she reported that 17 of them were experienced to a severe degree and one of them was reported as being present to a mild degree.

Q. What type of day-to-day behavior would you expect to see from someone who is endorsing this number and level of severity of symptoms of ADHD?

A. Well, some of that is contained in the individual prompt, so there are times when Ms. Ramsay reports having severe problems with, for instance, forgetting things. There are other times when we would just expect to see general pretty significant life impairment. To have a diagnosis of ADHD, you only actually have to have five symptoms under the current criteria if you're 17 or older. And so reporting 17 out of the 18 symptoms as being present to a severe degree, we would expect someone to be grossly impaired. We would expect someone to not be able to function in school or work settings. We would expect someone to have deficits that I would expect to be

visible in terms of everyday behavior in life, to have that many more symptoms than are needed for a diagnosis.

Q. In your opinion, are Ms. Ramsay's reports as to the level and degree of her symptoms credible based on the other records that you see?

A. At the very least, I would say they're not adequately supported by objective evidence.

Q. What is the Integrated Visual and Auditory Continuous Performance Test?

A. That's a computerized test that's often given as part of ADHD evaluations, where someone has to press keys at certain times during the task and then withhold pressing during other times. So it's supposed to look at both attention as well as self-control.

Q. And is this another test that Dr. Smith administered?

A. He did.

Q. How did Ms. Ramsay perform on this test?

A. Just to be precise, I'd have to go back to --

Q. Please do. I'm sorry.

A. Let's see. So I'm back in Dr. Smith's report.

Okay. Dr. Smith actually administered the test that you mentioned twice, it's listed. And there were a number of very low scores both times.

Q. And if you wait just a minute, Dr. Lovett.

THE COURT: What page?

MS. MEW: Page 12, page 11, beginning on page 11.

THE WITNESS: This is page 11 to 14 of the report where it says page X of 31.

MS. MEW: Just hold on for one minute.

THE WITNESS: Sure.

MS. MEW: So this is Exhibit 3B.

MR. BERGER: Okay. Thank you.

BY MS. MEW:

Q. So if you could continue.

How did Ms. Ramsay perform on this?

A. Well, the tests that we're describing, it's known as the IVA, or I-V-A, for short. It generates many scores. Dozens of scores, actually. But the overall scores are the ones that I think -- total scores or composites are the ones that are, in some sense, most important, or easily interpretable. Ms. Ramsay's performance was far below the average range at the 1st percentile. It appears that, again, if these scores were taken at face value, her attention skills and her self-control skills would be very, very poor, in the bottom 1 percent of the population.

Q. Do you consider these scores to be credible?

A. I don't consider them to be adequately supported.

Q. Dr. Lovett, is it appropriate to diagnose a learning disability or ADHD based solely on scores of diagnostic, in-office assessments, diagnostic assessments?

A. No. It's in the criteria for both types of disorders. If you look at the DSM criteria for both learning disabilities and ADHD, you see reference to things in real world settings, educational and occupational functioning, in the case of learning disabilities, academic, social and occupational situations for ADHD. So you see reference to things outside of the diagnostic context.

Q. Do you remember, from your review of Dr. Smith's report, whether he had any, what you've discussed as real world evidence that he considered as part of his report?

A. Yes. I remember at the very least there were report cards, selected report cards that at least he had listed as reviewing. And there may be more. I can go to the listing of things.

Q. Okay. So we're back to Exhibit 3B on the first page, first and second page.

A. So the records that he describes as having reviewed include an MCAT score report, the ACT score report. So those two, obviously, very important, real world standardized tests, taken without accommodations. He reports the report cards that I had mentioned earlier, a high school transcript, an undergraduate college transcript, as well as the Step 1 score report.

Q. And how did Dr. Smith treat this real world evidence in his analysis?

A. At one point in the report, I believe he described the report cards and the real world records, something like that, as not clearly showing impairment or not clearly showing problems academically. Let me see. It may have been in the summary.

Perhaps it's in the background history.

Q. And that's fine. I don't think you need to look for a direct quote if that's your...

A. Yeah. I remember at one point there was an admission that there wasn't clear evidence from the report cards of problems. And with regard to some of the other evidence that I mentioned, the MCAT as well as -- well, for the MCAT at the very least, there's a description on page 7 of the report about reading strategy involving not reading any of the passages until you first answer the questions that you could without reading the passage, something we've heard about a number of times already.

So the evidence from the real world was discussed. I don't believe it was interpreted correctly, but it was reviewed.

Q. If you look on page 29 of the report, the first full paragraph, is that what you were looking for?

A. Yes, that's actually the exact passage I was thinking of. In the first full paragraph, the only full paragraph on that page, the available school records do not clearly reflect academic struggles in elementary, middle or high school. And

then Dr. Smith provides what he feels is a sort of explaining away of that. This is the result of the family obtaining help, et cetera, which we've heard already in the hearing.

Q. In the records that you reviewed relating for Ms. Ramsay's school records that we've discussed in this hearing, did you see any indication in those records that she had received informal accommodations?

A. I did not. Even when there were places on the report cards where there were spots for the teacher to indicate that specifically, any sort of unusual or additional or atypical support or help. So no, absolutely not.

Q. Dr. Lovett, are you familiar with the ACT exam?

A. Generally, yes.

Q. Can you generally describe its content?

A. It's a test that's used for college admission. It has different sections that yield scores in a variety of areas. And the overall scores include English, math, science and reading.

Q. Is the ACT a test used for diagnosing learning disabilities?

A. It's not a test that was designed to diagnose learning disabilities through a clinical evaluation, but it can provide very helpful evidence, because, remember, the learning disability criteria involve real world functioning. So it can provide evidence that's certainly relevant to making a

diagnosis. And if someone has a learning disability, we would expect it to be reflected on that test, so long as it's taken without accommodations.

I should also mention the ACT has a writing portion, I don't think I mentioned that earlier, as part of the scores.

Q. Well, we can turn to -- why don't you turn to Defendant's Exhibits 30 and 31, so you have the scores.

A. Okay. I'm there.

Q. Do you know how many individuals take the ACT exam each year?

A. I understand that it's been somewhere between a million and 2 million and may have surpassed 2 million recently.

Q. And how does the cohort of individuals who take the ACT compare to the general population?

A. In a rough way, I would describe it as reflecting the general population at that age and grade level.

Q. How did Ms. Ramsay perform on the ACT?

A. So the -- when she took it in March of 2007, her overall score was at the 90th percentile, so in the top 10 percent of that cohort that we described. And her reading score, in particular, the overall reading score was at the 87th percentile, so in the top 13 percent of that --

Q. And you're looking at Exhibit 30?

A. I am. So that was the March 2007 administration of the ACT.

And then she took it again in October of 2007. Her overall score was at the 97th percentile, so in the top 3 percent of individuals in that cohort. And then the reading score in particular was at the 91st percentile, so in the top 9 percent of the individuals in the population there.

Q. And you're looking now at Defendant's Exhibit 31?

A. Yes.

Q. Would Ms. Ramsay's performance to perform at this level on the ACT exam, would Ms. Ramsay need to read with fluency?

A. I believe so, yes.

Q. Would she need to read with automaticity?

A. Some degree of it, yes, absolutely.

Q. What does Ms. Ramsay's performance on the ACT tell us with respect to her alleged learning disabilities, ADHD?

A. It's among many pieces of evidence that really undermine those diagnoses. To have a learning disability and to be performing in the top 3 percent on a college admissions test that is a reading-based test, with some writing, to --

MR. BERGER: Your Honor, I'm going to object at this point because of lack of foundation, because all that Dr. Lovett has said is that he's generally familiar with the ACT. We don't know if he's familiar with the ACT as it was administered when Ms. Ramsay was taking it. We don't know the extent of his familiarity. We don't know --

THE COURT: If that's a form of an objection,

overruled.

MR. BERGER: Yes, sir.

THE COURT: You'll have an opportunity to cross-examine the witness.

You may continue, sir.

BY MS. MEW:

Q. What does Ms. Ramsay's performance on the ACT tell us with respect to whether she's substantially limited in any major life activity relevant to taking standardized tests?

A. Well, with regard to the tests that she -- it suggests that she is generally not substantially limited in that regard.

Considering the Step 1 exam, which she's applied for accommodations on, one skill that's needed when you're taking that test is reading comprehension skills under timed conditions. And those were measured in the ACT and found to be not only adequate but well above average.

Q. Let's turn now to Defendant's Exhibit 32, which is Ms. Ramsay's MCAT score report.

Are you familiar with the Medical College Admission Test?

A. Again, generally. I have seen sample items that have been disclosed by the Association for American Medical Colleges, the group that administers the test. I'm familiar with the different sections and what the formats of the items are like.

Q. Can you very briefly describe its consent?

A. Yeah. So the MCAT has changed over time. The version

that Ms. Ramsay took yielded scores in four areas, physical sciences, verbal reasoning, biological sciences and then a writing sample. So the physical sciences, verbal reasoning and biological sciences involve multiple choice questions. And of those three sections that are multiple choice based, the physical sciences and biological sciences are what I would call content intensive, content heavy, in the sense that they are relying on specific premedical knowledge that you're supposed to have. You're applying to get into medical school.

The verbal reasoning portion I would not describe as content heavy in that sense. You're not expected to be familiar with a lot of specific background content for the different passages. Instead, you're supposed to be able to read, comprehend and analyze them under the timed conditions under the standard administration conditions of the test.

Q. Is the MCAT a test that can be used to -- as a diagnostic test for learning disabilities?

A. Again, I wouldn't call it a diagnostic test. It wasn't designed for the purpose of diagnosis of learning disabilities, but it's absolutely a test where we would expect learning disabilities to be reflected. It certainly is a part of the information that should be considered during a diagnostic assessment of learning disabilities.

Q. How does the cohort who takes the MCAT compare to the general population?

A. Well, if you're taking the MCAT, you're typically applying to medical school. And so if you're a medical school applicant, you may be a junior or senior in college. You may have graduated from college. We would expect individuals who are taking the MCAT to be above average compared to the general population in terms of their academic skills.

Q. And how did Ms. Ramsay's performance compare to this above average cohort?

A. Her overall score on the MCAT was at the 79th percentile. So better than 79 percent of that select group to begin with.

Her verbal reasoning score, which, again, is the one that really represents that timed reading comprehension, that was at the 67th percentile. So her performance was better than two-thirds of that select group when it comes to timed reading comprehension.

Q. Does performance at this level on the MCAT require reading with fluency?

A. I believe it does.

Q. And does performance at this level of the MCAT require reading with automaticity?

A. I do believe so, some degree of automaticity.

Q. What does Ms. Ramsay's performance on the MCAT tell us with respect to her diagnosis of learning disabilities and ADHD?

A. Certainly with regard to the learning disability diagnoses

that she's applied for accommodations under reading and writing, it severely undermines those diagnoses. She performed in the average range on the writing sample and she performed above -- well, she performed in the average range again on verbal reasoning, compared to that highly select group.

Q. What does Ms. Ramsay's performance on the MCAT tell us with respect to whether she is substantially limited in any major life activity relevant to taking a standardized test?

MR. BERGER: Objection to legal conclusion.

THE COURT: Overruled.

THE WITNESS: It suggests that she does not have those limitations with regard to tests that are similar in format in terms of what you have to do on the MCAT, at least. You know, a reading-based test where you're responding to multiple choice questions.

BY MS. MEW:

Q. Just shifting gears a bit.

We've alluded to this before, but in the course of this litigation, have you reviewed additional school and standardized test records for Ms. Ramsay?

A. Again, yes.

Q. And you were here for the testimony yesterday, so you were following along and I don't need to go through --

A. I was. Some of those I had seen and others I had not.

Q. In Ms. Ramsay's case, did the results of the diagnostic

testing conducted by Dr. Smith, with respect to where the scores were exceptionally low, match with what you've seen and heard about in her school and other standardized test history?

A. They directly and thoroughly contradict each other.

Q. In your opinion, does Ms. Ramsay meet the diagnostic criteria for any specific learning disability?

A. No, I don't believe so.

Q. In your opinion, does Ms. Ramsay meet the diagnostic criteria for ADHD?

A. I don't believe there is sufficient evidence to conclude that ADHD is present. And there also is some evidence that suggests the opposite, that it is not.

Q. In your opinion, again based on the materials you've reviewed, is Ms. Ramsay substantially limited in any major life activity relevant to taking the USMLE?

A. At least with regard to the learning disabilities and ADHD, again, I could not find sufficient evidence that she is.

Q. Or that she requires extra time on the USMLE?

A. Exactly, yes. That I cannot find -- that I wasn't able to find sufficient evidence, certainly, of a need for additional time.

Q. Dr. Lovett, I think you testified at the start of your testimony that when you make recommendations to NBME, sometimes you recommend denying, sometimes you recommend granting, sometimes you make no recommendation at all. Is this a close

case, is this a borderline case between yes or no?
A. Even based on the initial documentation, I would say no, it's not a close case. So given that even when I first reviewed the case, there were multiple pieces of clear real world evidence of adequate or above average performance on timed measures of reading comprehension, from the real world, I would say no. And since I have seen some additional documents and even, honestly, having sat here for this hearing, I've heard even more that really undermines both the diagnoses, as well as the accommodation needs, relative to the standard that we use.

MS. MEW: Thank you, Dr. Lovett.

THE COURT: Very well. Cross-examination.

MR. BERGER: Your Honor, it's 12:30 --

THE COURT: I'm aware of the time.

Are you ready to proceed, Counsel?

MR. BERGER: Do you want me to --

THE COURT: Yes. I said before we resumed that we would be taking lunch at a quarter of 1:00.

MR. BERGER: Okay.

THE COURT: And we'll be in lunch until 1:30.

MR. BERGER: Right.

THE COURT: I want to use this time as much as I can.

MR. BERGER: Yes.

THE COURT: So I don't have to spend your time and my

time any longer than necessary.

MR. BERGER: Absolutely.

THE COURT: All right?

MR. BERGER: I apologize, I missed that.

THE COURT: No problem. I'm just trying to make sure it's clear.

CROSS-EXAMINATION

BY MR. BERGER:

Q. Dr. Lovett, good afternoon.

A. Good afternoon.

Q. You recall that several weeks ago I took your deposition. Correct?

A. Yes.

Q. And I asked you at that time several questions about the tests that Dr. Smith administered to Ms. Ramsay and the results that he got.

And I may want to refer to some of those, again, specifically, but generally, I asked you, for example, with respect to the WIAT-III, which you discussed in your testimony, whether you had any doubt that Dr. Smith had actually administered that test. And let me ask you that question now.

Do you have any doubt that he administered the portions of the WIAT-III that he described in his report?

A. I have no reason to doubt that, no.

Q. And do you have any doubt that he -- that the results of

his administration of that test were as he reported?
A. No. I haven't rescored them, but I have no reason to doubt that the scores, you know, were calculated correctly in the sense that Ms. Ramsay obtained those scores on those tests.
Q. And I asked you also I believe with respect to the WIAT-III whether you would agree that that was an appropriate test to administer in a case where there was consideration of a dyslexia diagnosis.
A. Yeah.
Q. And what's your answer to that?
A. I believe it was what I'm going to say it is now as well, which is that it can certainly contribute useful information towards that diagnosis. Like any piece of evidence, it has to be interpreted correctly, but to give that during a diagnostic battery would not be inappropriate.
Q. And that's generally consistent with your testimony so far today. Correct?
A. I hope so.
Q. And the same -- let me just quickly review the same set of questions with respect to the Woodcock-Johnson IV.
Do you have any doubt that Dr. Smith administered those portions of the Woodcock-Johnson IV that he described?
A. No.
Q. And do you have any doubt that the results from his administration were what he reported?

A. I have no reason to doubt that the scores were miscalculated.
Q. And again, is that a test that is appropriate for a situation where a diagnosis of dyslexia is being considered?
A. As I had said in the deposition and as I had said with regard to other tests that were described, it can certainly contribute useful evidence when one is assessing the presence of learning disabilities if it's properly interpreted.
Q. All right. And the same question then with respect -- or series of questions with respect to the Gray Oral Reading Test, or GORT.

Do you have any doubt that he administered the GORT as he described?
A. No.
Q. And do you have any doubt that he -- that the results were what he reported?
A. Again, I have no reason to doubt it. I haven't rescored it, but I have no reason to doubt that those scores were correctly calculated.
Q. And is the GORT an appropriate test to administer in a case where a diagnosis of dyslexia is being considered?
A. As with the others, it can contribute useful information if it's interpreted properly.
Q. Now, I don't believe that in the deposition I asked the same question with respect to the IVA or IVA+Plus. That test,

as I understand it, is one that relates to the diagnosis of ADHD; is that correct?

A. Yes.

Q. And do you have any reason to doubt that Dr. Smith administered that test as he described in the report?

A. No.

Q. And do you have any reason to doubt that he achieved the results that he reported?

A. No.

Q. And is that an appropriate test to consider when considering a diagnosis in an adult like Ms. Ramsay of ADHD?

A. Although it's not a primary source of evidence, I don't think it's inappropriate to include that in a battery for ADHD.

Q. Do you recall from Dr. Smith's report whether Ms. Ramsay took her ADHD medication on the day that he tested her, that Dr. Smith tested her?

A. If I recall correctly, she did not take her ADHD medication on that day. I would have to check the report, but I recall that --

Q. Yes, I think you're recalling correctly. I think that's what the test said -- what the report says.

Is that an appropriate procedure when you are testing someone for ADHD?

A. There are debates about that. There's no consensus among clinicians in my experience, so there are reasons why you might

want to have someone on medication, there are reasons why you might want to have them off medication. I don't think it was inappropriate to ask Ms. Ramsay not to take medication or to test her off medication.

Q. Do you know, and this is kind of a legal question, so I will apologize in advance, but I think certainly you have some familiarity with the ADA.

Do you know what the ADA provides as to whether mitigating measures like medication should be considered in determining whether somebody has a disability?

A. My understanding is that it differs with regard to the issue of disability versus accommodation needs. And for the purposes of disability, I understand the current version of the ADA as amended to indicate that determination of disability, as opposed to accommodation needs, should be made without reference to mitigating factors, with the exception of eyeglasses, I believe. Accommodation needs being another matter.

Q. So when Dr. Smith tested Ms. Ramsay based on what he has reported, she was not, on that day, getting whatever benefit she gets from the ADHD medication that's been prescribed for her; is that correct?

A. I'm sorry, could you repeat that question?

Q. Let me try and restate it.

On the day when Dr. Smith tested her and based on what he

said in his report, on that day she did not have the ADHD medication, so that mitigating measure was not in play when he tested her?

A. Correct.

Q. All right. You mentioned with respect to ADHD that one of the criteria is the presence of symptoms prior to the age of 12.

Is that generally correct?

A. Yes.

Q. Is it also true that ADHD can be diagnosed for the first time when somebody is an adult?

A. It can certainly be diagnosed for the first time when there's evidence of the symptom prior to age 12.

Q. And the DSM-5 specifically says that it can be diagnosed in an adult?

A. I know that there are -- I mean, I would have to check the DSM, but I certainly, you know, know that the DSM-5 acknowledges adult ADHD-related issues. I don't think there's any problem diagnosing it in an adult. It can even be diagnosed, as I say, for the first time in an adult, but, again, it has to show symptoms much earlier on.

Q. The group of people who apply for accommodations for USMLE Step 1 are not a group of people that is the same as the general population, would you agree with me?

A. I would certainly -- I would not expect them to be.

Q. They are all people who have been accepted to a medical school. Correct?
A. I believe so.
Q. And they're all people -- and it varies from one school to another, but they are all people who have completed either generally two years or three years of medical school. Correct?
A. I would have to check the exact requirements for taking the Step 1 exam, but as a general rule, they are, at the very least I believe enrolled in medical school. As you say, it would vary from school to school, but as a whole, yes.
Q. Okay. And my -- last question before we break.

On your direct testimony, you discussed the fact that in cases that NBME sends you for review, that in some cases you do recommend that an accommodation be granted, and in some cases you recommend against that.

What would you estimate is the percentage of cases in which you recommend that an accommodation be granted?
A. I don't keep track of that. I couldn't estimate that. And as I say, in some cases I don't even make a recommendation, I might just summarize things. I also review for other testing agencies and so it's hard to think about what was NBME versus other things.
Q. Okay. One other -- one other question.

What other testing agencies do you currently review for?
A. I review regularly for the National Board of Osteopathic

Medical Examiners, the New York State Board of Law Examiners, for the New York Bar Exam and the Law School Admissions Council, for the LSAT. Those I would say are the regular agencies. Occasionally I also will review by special request for an agency that has a particular issue and have reviewed for others in the past.

MR. BERGER: Your Honor, I think this is a good time.

THE COURT: Very good. We shall be in recess till 1:30. And enjoy your lunch today.

And sir, I will advise you you're under cross-examination now and you cannot consult with counsel in reference to your testimony. You can talk to them about anything, lunch or the game last night or whatever or this weekend, but not about your testimony because you're under cross-examination.

THE WITNESS: Thank you.

THE COURT: We'll be in recess.

(Luncheon recess at 12:46 p.m. until 1:31 p.m.)

THE COURT: You may be seated.

You can resume the witness stand, sir.

THE WITNESS: Thank you.

THE COURT: And I'll remind you, you are still under oath from previously being sworn in this afternoon.

THE WITNESS: I understand.

THE COURT: You may proceed, Counsel.

BY MR. BERGER:

Q. In teaching students who are training to become psychologists, who are studying to become psychologists, do you teach courses about assessment or have you taught courses about assessment?

A. I will be starting the graduate courses for school psychologists in the spring. I've certainly taught courses for undergraduates on assessment, and some of them are in education or other fields where they are administering achievement measures, things like that.

Q. Would you teach your students that they should administer a test like the ACT in order to help them in reaching a diagnosis?

A. I would definitely tell them they need to review someone's ACT scores when making a diagnosis. The ACT is not a test that's given in a one-to-one format from a clinical evaluator, so it's information that would need to be reviewed on making a diagnosis, and I certainly have taught that.

Q. And I assume that the same would be true for the MCAT?

A. Exactly.

Q. Do you believe based on your knowledge of ADHD that someone with ADHD can be successful in school?

A. With intervention and accommodation, I certainly think that's possible, and I've seen it happen.

Q. And do you believe, again, based on your knowledge and

experience, that someone with dyslexia can be successful in school?

A. Dyslexia is a little tougher, because if the intervention is effective, there's a question of whether or not the person really still has dyslexia or a learning disability in reading or anything like that. But I would say that with accommodations and interventions, I've seen students who at least at some point have had a diagnosis of dyslexia, or a profile of scores that may indicate a learning disability in reading, be successful in school with appropriate measures. That really depends on the exact data for that individual.

Q. Well, in the case of a person with dyslexia, would a possible accommodation be to allow that person additional time to read whatever had to be read?

A. It really would depend on the person's profile. I can see that being one of the things, but for a child who has dyslexia, at least as it's generally understood as a learning disability in reading, the term "dyslexia" is used somewhat more flexibly, so it's a little harder to speak about dyslexia. But if we're talking about what qualifies as a learning disability in reading, at least under the DSM, extended time would not be the first thing that would come to mind. If someone has trouble, especially as a child with a learning disability in reading, then I would expect that they would actually need a more intensive accommodation, like a reader or something like that,

on tests. But extended time could be part of a package of accommodations that are given to a student with dyslexia.

Q. All right. So Ms. Ramsay -- and you were present during Ms. Ramsay's testimony. Correct? And she testified that she has, in some situations, been able to use the Kurzweil program.

Are you familiar with that?

A. Generally, yes, uh-huh.

Q. All right. So if someone who had dyslexia was permitted to use a Kurzweil -- the Kurzweil program, would that person still be a person with dyslexia?

A. Well, first of all, since you're referring to Ms. Ramsay's testimony, I don't recall a period of time during which she reported having had access to Kurzweil or having used it.

Putting that aside, an individual who has a learning disability in reading or some sort of reading problems, could certainly be assisted by the Kurzweil technology.

Q. Do you believe that people with ADHD can be successful in work or in their careers?

A. Again, if someone has appropriate intervention, then they certainly may be able to.

Q. And do you believe that somebody with dyslexia can be successful in work or in a career?

A. Well, again, there, if the intervention is successful, I don't know if I would use the term "dyslexia" or a learning disability in reading to describe them anymore. Those sorts of